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CONVEYANCER'S NOTEBOOK.

County Court Reform.—The fact that the Lord Chancellor had set up a committee to inquire into county court reforms would not normally be within our purview since matters with which we are concerned do not usually come into the county court. We refer to it here only because there is one reform that seems overdue. The county court jurisdiction in equity matters is very limited, though the figure of £500 is actually more than in common law matters. Where the shoe really pinches is that the amount involved may be quite small and yet excluded because, *e.g.*, the total estate of the deceased exceeds £500.

In our view what would be a valuable reform is to enable the county court to deal with the construction of wills where the amount *actually involved* does not exceed, *e.g.*, £500. It is a most common experience that it is in small estates and involving small legacies where "home-made" wills defy any construction in the ordinary sense. Here, very often all that is really wanted is some order of the Court to protect the personal representatives. Since the recent decision in *Re Diplock*, noted later in this issue (*post*, p. 275), personal representatives may be even more conscious of this need.

While the difficulty can be met sometimes by a deed of family arrangement, this is often defeated by the infancy or some similar disability of one of the residuary legatees or other party having a possible interest. In this kind of case High Court proceedings, even reduced to the simplicity they now have reached, are still quite disproportionate in cost to the sum involved. So much time and money could be saved, particularly in country cases where they so often arise, if the county court had jurisdiction. Very many of the problems do not really involve intricate rules of law and are not more difficult of construction than other informal documents with which County Court Judges are faced.

If it was felt that County Court Judges, usually drawn from the ranks of the common lawyers, should not be asked to determine intricate points of equity, we suggest that there might be power to adjourn the hearing before a High Court Judge, just as the Master does now. Then such hearing could be set down in the Chancery Division. In our view, if such a procedure did exist it would rarely be used and the parties would not ask for it because they would be perfectly satisfied with the

decision of the County Court Judge. Incidentally, such a jurisdiction might easily avoid the prolonged wrangling over wills the main effect of which is to promote disharmony in the family. With the much wider spreading of the country's wealth and the vastly increased number of small estates it is becoming intolerable that the only way personal representatives can be protected in their arduous and often gratuitous duties is the relatively expensive procedure of originating summons in the High Court. We personally think that the upper limit might at least be increased to £1,000 if only on the basis of the fall in the value of money. But we do not want to develop the matter in particularity. What we do seek is to do away with the old method of limiting the jurisdiction by reference to the value of the total estate or trust fund and not according to the amount actually involved.

Forestry Act.—The Forestry Act, 1947, was passed primarily to avoid the difficulty that restrictive covenants, the burden of which is to run with the land, must be entered into with the owner of dominant land capable of benefiting. It deals only with a covenant entered into with the Forestry Commissioners, and such a covenant shall be called a " forestry dedication covenant ". The effect of such a covenant shall be that the " land shall not, except with the previous consent in writing of the Commissioners or, in the case of dispute, under direction of the Minister of Agriculture and Fisheries, be used otherwise than for the growing of timber ", as defined by the Forestry Act, 1919. Where a " forestry dedication covenant " has been made the Forestry Commissioners have the same power of enforcement as if they had had ascertained land adjacent and capable of benefiting. Section 84 of the Law of Property Act, 1925, enabling restrictive covenants to be modified does not apply to these covenants.

The section does not expressly so provide, but it would seem that to be protected against a purchaser it would be necessary for the covenant to be registered under the Land Charges Act, 1925. The Act does not confer any greater powers of enforcement than a private owner would have if he had adjacent land. Section 2 provides for the application of the power to make such covenants to tenants for life, trustees for sale, and certain specified persons, such as the incumbent of the glebe.

The purpose of the Act appears to be to provide an alternative procedure to compulsory acquisition of the land subject to the covenant. By section 5 (1) it is provided that nothing in section 4 of the 1945 Act shall authorise compulsory acquisition while the covenant is enforced and the land is used and managed in accordance with the Commissioner's " plan of operations ". There are some subsidiary provisions and some special rules for Scotland.

Courts (Emergency Powers) Act.—The following direction has been received from the Chief Master, Chancery Division :—Every originating summons issued in the Chancery Division on or after

April 1, 1947, claiming leave, under section 1 (2) of the Courts (Emergency Powers) Act, 1943, to exercise any right or remedy available to the applicant in relation to or affecting any premises, shall contain in the body of the summons a statement whether such premises were or were not situate within an evacuation area described in the second column of the schedule to the Evacuated Areas (Termination) Order, 1947 (S. R. & O. 1947, No. 98), and if the premises were so situate, specifying the reason why, during the operation of the Defence (Evacuated Areas) Regulations, 1940 (S. R. & O. 1940, No. 1209), the said premises were excepted from the restrictions imposed by paragraph 4 (1) of such regulations.

The procedure above prescribed shall apply *mutatis mutandis* to applications by summons issued in pending proceedings pursuant to rule 17 (6) of the Courts (Emergency Powers) Rules, 1943.

Surviving co-owner—conveyance to purchaser.—We have received the following letter from a correspondent :—

In the December edition of the *Conveyancer* there is an article by W. J. L. Ambrose, late Registrar at the Land Registry, under the heading " Co-owners ", in which he states that in his opinion if a vendor is sole survivor of two or more co-owners, a new trustee should be appointed in order to make title under the trust for sale. This course was very generally adopted after the 1925 Acts until the passing of the Amendment Act which provides that " nothing in this Act affects the right of a survivor of joint tenants, who is solely and beneficially interested, to deal with his legal estate as if it were not held on trust for sale ".

May I suggest that the learned editor of the *Conveyancer* deal with the subject in an article in the next edition of the *Conveyancer*. Many of us have relied on the Amendment Act, and used the form on p. 757 of Volume 15 of the *Encyclopædia of Forms*, which is a very simple and convenient form whereby the survivor conveys as beneficial owner after reciting the death of the other joint tenant.

The point of the observation by Mr. W. J. L. Ambrose is based upon the principle that a purchaser should not be asked to take a title depending upon equities where this can be avoided. There is very much to be said for this view.

Where a joint tenant becomes owner in severalty by survivorship his right to deal with the property is preserved by this section in the Amendment Act in order to avoid titles being bad by oversight and not as a general means of disposition—at least this appears to be the case. If a title is taken from two trustees or a trust corporation a purchaser is not concerned with beneficial interests at all : Law of Property Act, 1925, s. 2 (1). The trust for sale is deemed to continue notwithstanding the beneficial interest is vested solely in one person : Law of Property Act, 1925, s. 23. Therefore, in such a case no question of the validity of the disposition can arise. On the other hand, if the conveyance is made in pursuance of the 1926 Act, a purchaser is put on notice of the trusts and must investigate the title to the equities.

Failure to make the proper inquiries would leave him unprotected as a *bona fide* purchaser or, perhaps, even independently of notice a purchaser may not get a good title.

The following example taken from practice will illustrate this point. Property was conveyed to X and his daughter Y as joint tenants beneficially entitled. X and Y made wills, each devising the property to the other for life with remainder to Y's children. X died without having revoked his will. The effect of this was to sever the joint tenancy on the proceeds of sale: *Re Wilford's Trusts*, 11 Ch. D. 267 (and see Vol. 9, p. 190). Y subsequently disposed of part of the property as solely beneficially entitled. As two trustees had not received the purchase money in accordance with the Law of Property Act, 1925, s. 27 (2), the legal title was in doubt, since the equities were on the title and the will of the deceased joint tenant had not (naturally enough) been investigated. Had an additional trustee been appointed no question could have arisen.

The extent to which inquiries should be made under the 1926 Act has not, so far as we are aware, been made the subject of judicial pronouncement, and we are not saying that in our example the purchaser would take a bad title. The point in conveyancing is to avoid all questions, if possible. The Property Legislation of 1925 provides a simple expedient for avoiding questions, and hence it is more convenient to use it, particularly as the appointment of a new trustee can be included in the conveyance to the purchaser. A precedent for such a conveyance is included in this issue (*post*, p. 379).

THE REGISTERED ESTATE.

By R. C. CONNELL, LL.M., Barrister of the Supreme Court of New Zealand.

[*Continued from p.* 190.]

2. EXISTENCE INDEPENDENTLY OF THE EQUIVALENT COMMON LAW ESTATE.

It cannot yet be said that the recognition of a "statutory" or "registered estate" which stands apart from the equivalent "legal estate" of the common law is well known or entirely free from doubt. It is submitted that the distinction is correct. The doubts which exist arise in some measure from a certain lack of clarity in the judgments and omission to distinguish "statutory title" (*k*) and "statutory estate" which we are now considering; the existence in most jurisdictions of the two systems of land tenure concurrently which leads to the general use of words applicable exclusively to one system; the reversion of the Land Registration Act, 1925 (England), at times to the nomenclature of unregistered conveyancing; the fact that the "statutory" or "registered estate" is enforceable in all Courts and is in that sense legal; to the fact that many of the incidents of the

(*k*) Previously discussed.

"registered estate" are the same as the equivalent estate of the common law and are applied by analogy but not yet fully defined; and to the last but very vital fact that, perhaps, a document prepared for registered conveyancing may have a dual effect. It is good as an agreement *inter partes* and as such enforceable both before and after registration: it is acted upon by the State when alteration of the register is effected and the statutory effects of transfer, lease or other disposition then operate in accordance with the provisions of the statute and so much of the general law as is availed of by or under those provisions. The document may originate a duality of rights and obligations, *i.e.*, under the general law and also by statutory enactment. Such rights and obligations arise as regards the general law by execution, and as regards statutory law by registration. In the former case, the facts must be pleaded and the document proved as usual in the case of ordinary dealings between parties. In the latter case the registration is pleaded and proved. In the former case the document itself must be construed, in the latter the document will be construed only if it is a document of title, thus a lease, mortgage or similar document.

To complete the comparison of the registered estate and the equivalent estate of the common law it would be necessary to examine at length and in detail each of the incidents of the two estates (*i.e.*, the fee simple and leasehold estates) both under the systems of registration and at common law. The law on these issues even under the Torrens system is very obscure and unsettled. The registered estate has, perhaps, two significances: (1) in the general sense, the estate with its attached statutory rights, privileges and appurtenances, and (2) in the strict sense, the estate alone. Concerning the general sense, it may be said that the registered estate differs from the equivalent common law estate in the following respects:—

1. It has a statutory title.

2. It, probably, has all the incidents of the equivalent common law estate and also the equitable estate, these being applied by analogy. These are given statutory affirmance.

3. Each of the separate covenants of the leasehold estate receives by registration statutory affirmance in addition to its operation under the general law.

4. Incidental to it and also given statutory affirmance are all the rights, privileges and appurtenances belonging or appurtenant to the estate (subject to the exceptions contained in the Act). It is freed from all other estates and interests whatsoever, including estates and interests of His Majesty. Strictly, these rights are not part of the estate, for in that case it would not be necessary to make separate provision regarding them.

5. Various statutory powers are granted to, and duties imposed on, a registered proprietor of a particular estate. These may be regarded as incidental to the estate.

6. Transmissions do not operate as at common law. Thus, on bankruptcy alteration of the register is necessary for the transmission to be complete.

7. The law is only now being developed, and so other incidents not

yet defined may form part of the registered estate, or be incidental thereto.

The conception of "registered estate" conveys all these factors which are not conveyed by, *e.g.*, "legal estate".

It is possible to find in many judgments references to an estate arising by virtue of the statutes dealing with registration of land. On perusal, however, it is clear that the reference is to the title to the estate and not to the estate itself. The existence of the statutory or registered estate has been asserted mainly on principle by text writers both in England and Australasia. Their considerations have covered the fee simple only. It is submitted that both registered estates, *i.e.*, the fee simple absolute in possession and the term of years absolute, are in the same category, and are distinct from equivalent common law estates. On each registration the State gives its statutory affirmance that both the title and the estate, with all its incidents, are vested as shown in the altered register. This situation stands until further alteration of the register when the same procedure of affirmance occurs and *toties quoties*. It is clear, of course, that ownership of the estate necessarily involves ownership of the title thereto, for the latter is part of the former. Statutory rights are the highest recognised by the law. Thus, when the incidents of the estate and the rights, powers and privileges attached thereto are given statutory authority by affirmance this statutory estate rises to a higher order than the equivalent estate of the common law. All registered estates belong to this category of statutory estates.

The decisions concerning the registered estate in fee simple will not necessarily apply to the registered estate for a term of years absolute: but the existence of either registered estate in contrast to the equivalent common law estate is cogent evidence of the similar existence of the other registered estate.

It has long been a rule of law that there cannot exist two common law fees in the same land: Co. Litt. 18a; *Willion* v. *Berkeley*, Plowd. 223, at p. 248. This raises many questions which remain unanswered, *e.g.*, what happens to the legal estate of the common law on the granting of a statutory fee simple? Can this legal estate and statutory estate each exist in a different person at the same time? Section 69 seems clear in terms, but how does it apply on death of the registered proprietor, for pending registration of transmission there might be, contrary to one of the leading principles of the common law, an abeyance of seisin? These and other difficult questions, for example merger (on which there are conflicting authorities), will arise if we accept the conception of the registered estate as having its own identity. This should not deter us.

If we turn to the Land Registration Act, 1925, "registered estate" and "legal estate" are both defined in section 3:—

"'Registered estate', in reference to land, means the legal estate, or other registered interest, if any, as respects which a person is for the time being registered as proprietor, but does not include a registered charge and a 'registered charge' includes a mortgage or incumbrance registered as a charge under this Act".

"'Legal estates' mean the estates interests and charges in or over

land subsisting or created at law which are by the Law of Property Act, 1925, authorised to subsist or to be created at law".

It is submitted that the legal estates of the Law of Property Act, 1925, cease to be such on registration and become registered estates. Let us, as in the case of title, consider separately the two estates permissible in land. Many of the sections of the Act have already been set out so it will not be necessary to repeat them.

(1) The Estate in Fee Simple Absolute in Possession.

Under section 7 of the Land Transfer Act, 1875 (repealed by the Land Registration Act, 1925), the estate of first registration of freehold land was an estate in fee simple. By section 49 (which section was repealed and not re-enacted in the later statute) the registered proprietor could also create estates and interests as if the land were not registered. And so it was held in *Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch. 631, C. A. (*l*), that the legal estate might remain separate from the registered title until it was brought back by a new registration of a proprietor. This is no longer possible by reason of the repeal of section 49 and probably is one reason for section 69 (1) (4) of the 1925 Act.

If we refer to sections 5, 20 (1) and 69 (1) of the Act of 1925 it is striking that in each case the words describing the estate vested differ. Thus in section 5 the words of the Act are "an estate in fee simple in possession"; in section 20 (1) "an estate in fee simple", and in section 69 (1) "the legal estate in fee simple in possession".

As before it will be convenient if we deal separately with first registration and subsequent registration. First registration: No further provision would appear necessary to declare the nature of the estate vested in the registered proprietor than section 5. This section vests in the registered proprietor an estate in fee simple in possession in the land with all rights, privileges and appurtenances belonging thereto. Section 69 (1) indicates in two ways that the registered estate and the legal estate are probably not identical. First, it vests in the registered proprietor the "legal estate" in fee simple of the registered land. This would be surplusage if the estate vested by registration under section 5 in the registered proprietor were the "legal estate" of the Law of Property Act, 1925 (unless section 69 (1) is included *ex abundanti cautela* for the same reason as 69 (4)). Secondly, section 69 (1) refers to both "legal estate" and "registered estate" thereby implying a distinction. If the registered estate is not the legal estate then it must follow that it is a statutory fee simple having the incidents of the common law "legal estate" so far as they apply. Subsequent registration: The same considerations apply on registration of a disposition of freehold. On each new registration section 20 (1) confers on the transferee a new estate in fee simple together with all rights, privileges and appurtenances belonging thereto. First and subsequent registration: Sections 5 and 20 confer not only title to the estate. In express terms they confer an "estate" in fee simple including thereby all the separate incidents of the estate. The extent of these incidents is not at present capable of definition. It is clear,

(*l*) Referred to in *Att.-Gen.* v. *Odell*, [1906] 2 Ch. 75, C. A.

however, that in addition to the estate in fee simple statutory registration vests only the " rights, privileges and appurtenances belonging or appurtenant " to the estate transferred which are normally incidental to the estate and are not accidental or rights of a personal nature. These last named rights may, perhaps, be transferred by a transfer appropriately drawn and subsequently registered. In that case, the transfer will be *pro tanto* an event *inter partes*, and will not be properly registerable, although registration may be permitted in reference to the parts properly registrable. Accordingly, in an action special pleading will be required. Registration of matters not authorised by the Land Registration Act, 1925, if registration be effected in error, will probably not be operative (*m*).

The absence of the word " legal " in sections 5 and 20 (1) is, perhaps, indicative that the estate conferred by those sections is not correctly so described. The respective terms used in those sections are " an estate in fee simple in possession " and " an estate in fee simple ". To add the word " legal " to these phrases might make them more cumbersome, but a subsequent section, section 69 (1), so describes the effect of registration on the legal estate. Thus the proprietor of land is deemed to have vested in him without any conveyance " the legal estate in fee simple in possession ". " Conveyance ", also, is a technical word exclusively applicable to unregistered conveyancing and, perhaps, sustains the contention that a " transfer " may not transfer " the legal estate in fee simple in possession ", although it will transfer the registered estate.

It is interesting to compare section 4 with sections 5 and 20 (1). Section 4 concerns the " title " to an unregistered estate and the application for first registration thereof. On registration sections 5 and 20 (1) go further than vesting " title " to the estate for they vest an " estate ". The distinction may be subtle, but is consistent with the other indications of the existence of a statutory estate.

Sections 18 and 25 set out at length the powers of the proprietor of registered freehold land thereby by implication excluding other powers except such as are contained in the Act. Section 69 (4) declares that the estate for the time being vested in the proprietor shall only be capable of being disposed of or dealt with by him in manner authorised by the Act. Section 58 (1) by implication confirms this. These powers are referable neither to the legal estate of the common law nor mere registered proprietorship. They are incidental to a particular registered estate, and in that sense are annexed by analogy to the particular registered estate itself.

Sections 20 (1), 66, 75 and 95 impliedly recognise the difference between the registered estate and the " legal estate " of the common law, for they apply to the former estate provisions ordinarily applicable to the latter estate. Thus section 20 (1) states : " including (subject to any entry to the contrary in the register) the appropriate rights and interests which would, under the Law of Property Act, 1925, have been transferred if the land had not been registered. . . ."

Section 66 deals with the creation of liens by deposit of certificates;

(*m*) Such an event may well give rise to a claim against the Assurance Fund.

section 75, the acquisition of title by possession, and section 95 applies to registered land the statutory restrictions on the number of trustees.

Each of these factors might not in itself necessarily establish the separate identity of the registered estate in fee simple, but considered together they are convincing proof (*n*).

(2) The Term of Years Absolute.

The relevant sections are sections 9, 20 (1) and 23. It is clear that registration of a lease gives some statutory rights including a statutory title. It is submitted that by registration statutory affirmance is also given to the separate covenants and conditions contained in the lease when these are normally incidental to the lease. These terms may be both expressed and implied. FIRST REGISTRATION: Section 9 vests in the first registered proprietor of a leasehold title the possession of the leasehold estate with all implied or expressed rights, privileges and appurtenances. This section has already been discussed on the issue of title and so this will not be repeated, but the same considerations now apply. It is important to note that in addition to the "leasehold interest described", the section vests in the registered proprietor "all implied or expressed rights, privileges and appurtenances attached to such interest". Thus each of the terms of the lease, with the exceptions mentioned later, are affirmed by the express terms of the Statute. Sections 10, 11 and 12 declare the effect of first registration of good leasehold, possessory and qualified titles and do not call for discussion, as they have generally the same effect as section 9.

Section 20 (1) deals with registration of a lease of registered land and so differs from section 9 which deals with registration of a lease of unregistered land. It may conveniently be considered here. Section 20 (1) confers on the "grantee" on registration "the term of years absolute or other legal estate expressed to be created in the land dealt with, together with all rights, privileges and appurtenances belonging or appurtenant thereto". This seems more precise than section 9 as the statutory affirmance of the lease is not restricted to vesting "possession" of the leasehold estate and the rights incidental thereto in the registered proprietor. SUBSEQUENT REGISTRATION: Section 23 applies to dispositions of the estates affirmed by sections 9 and 20 (1). It vests in the transferee or underlessee on registration "the estate transferred or created to the extent of the registered estate, or for the term created by the sub-demise, as the case may require, with all implied or expressed rights, privileges and appurtenances attached to the estate transferred or created". Thus on registration of each transfer or sub-demise there occurs a new statutory affirmance of each of the terms of the lease, with the exceptions mentioned later. It is interesting to compare section 8 with section 23. The former refers to the "title" of an unregistered lease. The latter goes further than vesting title for it vests an "estate". As in the case of the fee simple, this is consistent with the other indications of a statutory estate.

(*n*) In considering the Australasian authorities later discussed it is necessary to note that the *indicia* contained in the Torrens Statutes of the separate identity of the registered estate are not as strong as in the English Act.

FIRST AND SUBSEQUENT REGISTRATION : Section 69 (1) vests in the registered proprietor of leasehold " the legal term created by the registered lease " and so implies a distinction between the registered estate of leasehold and the common law leasehold estate. We may now consider the terms of a lease which are given statutory affirmance by the sections we have considered. It is clear that such terms cannot be unrestricted but must be characteristic of leases, and covenants which run with the land. Collateral guarantees and personal covenants which do not run with the land are not within this category. These do not pass on the statutory transfer of the leasehold estate, although by suitable terms contained in the transfer they may pass at common law. Registration of matters not authorised by the Land Registration Act, 1925, will not benefit the parties thereto. The statutory affirmance of the terms of the lease is of importance when, for example, a right of renewal, option to purchase or other provision normally incidental to the lease is made in breach of authority of the lessor, or, perhaps, even in the case of a transferee for value in breach of some statutory provision. For these reasons the registered leasehold estate, it is submitted, may be said to be a " statutory estate " in the true sense of the phrase.

Let us turn now to the Australasian decisions. These cases are not numerous. They are uniform, authoritative and include the considered judgments and *dicta* of, it is respectfully submitted, the greatest Judges of the two countries—Griffith, C.J., and Isaacs, J., of Australia; Williams and Edwards, JJ., of New Zealand. They present a clear picture. Any authorities contrary to the views here submitted have also been included. It will be interesting first to note the views of J. E. Hogg in his Australasian Torrens system in which as long ago as 1905 he said : " The change in the meaning of the word ' seised ' is also a subsidiary matter, depending entirely for its importance on the very great change in nomenclature constituted by the substitution of ' estate ' simply for ' legal estate ' or ' equitable estate '. This change of nomenclature marks a real change in legal outlook and theory, and an appreciation of its importance is necessary in order to understand a leading principle of the Torrens system, which may be thus formulated. The estate in land conferred by registration under the system is neither the common law legal estate or seisin, nor the statutory seisin given by the Statute of Uses—for these may be outstanding, as in a mortgagee (*ante*, p. 757)—nor the equitable estate of English equity jurisprudence, but a new statutory estate which may be best described as the ' registered estate ' " (p. 766).

The earliest case to consider the nature of the registered estate in fee simple is *Lange* v. *Ruwoldt* (1872), 6 S. A. L. R. 75, on appeal 7 S. A. L. R. 1. This appeal was later overruled in *Cuthbertson* v. *Swan* (1877), 11 S. A. L. R. 102, and so it is of doubtful authority and value.

In *Matthews* v. *Paraone* (1889), 7 N. Z. L. R., C. A. 528, the transferees had obtained a certificate of title under the Land Transfer Act, 1885, after a conveyance to them held to be void at law. Williams, J. (*o*), delivering the judgment of the Court of Appeal

(*o*) The Rt. Hon. Sir Joshua Williams, P.C., was first appointed a Judge of the Supreme Court of New Zealand in 1875. He resigned on January 31, 1914, on being

(Richmond, Williams and Denniston, JJ.), at p. 537, says: "If the conveyance to the appellants is void the registration of the appellants under the Land Transfer Act was improperly obtained. If the appellants have wrongfully obtained what is equivalent to the legal estate in the land of the respondents they are at least trustees for the respondents and the Court will give effect to the trust even though the case is not one of those enumerated in section 56 of the Land Transfer Act". Even the *dicta* of Williams, J., are treated with the utmost respect in his country, for his preciseness and choice of language has never been equalled. It is a considered judgment in which the difference between the registered estate in fee simple and the legal estate of the common law is carefully pointed out.

Under the Torrens system the statutory provisions declaring the effect of transfers apply to transfers of the fee simple, leases and mortgages similarly. The English system provides separately, with distinct provisions, for each of these cases. The provisions of the latter system regarding transfers of the fee simple and leases are similar in substance and effect to those of the Torrens system.

The next case also concerns the fee simple, but is applicable also to leases. It defines limitations to the rights which pass to the transferee of the fee simple on a transfer. It does not consider the effect of the memorandum of transfer *inter partes* under the general law but, on the pleadings, is confined to the statutory operation and effect of a transfer. In *Measures* v. *McFadyen* (1910), 11 C. L. R. 723, the plaintiff was the registered proprietor of the fee simple. A breach of covenant in a registered lease of this land had been committed by the defendant (the lessee) and was complete before the transfer of the fee simple to the plaintiff. The plaintiff had recovered damages for the breach. The High Court of Australia held that the verdict could not stand. After setting out the relevant sections (*p*) of the Act, Griffith, C.J., at p. 731, says: "The question is whether the right to sue for damages for a breach of covenant, not being a continuing breach, which is complete before transfer, passes by virtue of these provisions to the transferee. The term 'transfer' in section 51 means the transference of estate resulting from registration, and the word 'thereto' refers to the estate or interest transferred. The estate or interest transferred is one thing, and the personal right of action in respect of an antecedent completed breach of contract is another. In my opinion the words of this section are not sufficient to transfer the

called to the Privy Council. It is interesting to notice the comment of Stringer, J., in another case on another point: "This appears to have been the opinion of Mr. Justice Williams, than whom there was no higher authority upon the Land Transfer Acts . . .": *Boyd* v. *Mayor of Wellington*, [1924] N.Z. L. R., C. A. at p. 1196.

(*p*) The Real Property Act, 1900, N.S.W. (No. 25) provides: "S. 51. Upon the registration of any transfer, the estate or interest of the transferor as set forth in such instrument, with all its rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee, and such transferee shall thereupon become subject and liable for all and every the same requirements and liabilities to which he would have been subject and liable if named in such instrument originally as mortgagee, encumbrancee or lessee of such land, estate or interest.

"S. 52 (1). By virtue of every such transfer, the right to sue upon any memorandum of mortgage or other instrument and to recover any debt, sum of money, annuity or damages thereunder (notwithstanding the same may be deemed or held to constitute a chose in action) and all interest in any such debt, sum of money, annuity or damages shall be transferred so as to vest the same at law as well as in equity in the transferee thereof".

right to bring an action in respect of such a past breach. . . . The purpose of the Act was to transfer the estate or interest of the transferor in the land with all the rights incidental to present and future possession, but I do not think that it was intended to transfer also mere choses in action in respect of past and completed breaches of covenant ". Isaacs, J., in the same case, at p. 737, gives a very clear statement of the law : " Then it was urged by Mr. Knox, that even so, section 52 of the Real Property Act passed the right to the damages for the breach to the plaintiff. But the object of the section is only to perfect the transaction effected by the statutory transfer. With respect to personal obligations the Act primarily concerns itself with their security upon land for their fulfilment, and having provided a statutory transfer of the benefits of the obligation as between the transferor and the transferee, proceeds in this section to completely effectuate the transfer by affecting the third person, the obligor, also " ; and later he says : " Section 52 was intended to put an end to all this, and to perfect, even in regard to legal procedure, the simplicity and directness which otherwise characterise the Statute.

" It was not intended to extend, and its language is not sufficient to extend, to so radical and unexpected a change, and probably so unfair a change, as bodily transferring all accrued rights to damages, limited only by the Statutes of Limitation and existing independently of the continuance of the obligation under which they arose and of the land upon which they were originally secured ".

The last case considers the statutory rights from the aspect of the transferee of an estate in fee simple and the rights incidental thereto. The next case considers these rights from the aspect of the lessee and a transferee of the lessee's rights.

It was held unanimously by the Full Court of Queensland in *Cheyne* v. *Moses*, [1919] Q. S. R. 74, that a covenant by the lessor in a registered lease to pay at the expiration of the term granted for improvements made by the lessee did not run with the land, but was a personal covenant. As soon as the lessee expended money on making necessary improvements, a right came into existence to recover the value of such improvements from the lessor at the expiration of the lease. Such right did not pass from the lessee by registration of a transfer of the lease. A deed of even date with the transfer between the lessee and transferee had declared the lessee to be entitled to receive these moneys.

Chubb, J., delivering the judgment of the Court (Cooper, Real, Chubb and Lukin, JJ.) at p. 83 says : " Whether the covenant is or is not one which runs with the land, the moment the plaintiff expended money on making and made necessary improvements, there came into existence a right on the part of the plaintiff to recover the value of such improvements from the defendant at the expiration of the lease, and such right did not pass from the plaintiff by a mere assignment of the lease. See *Measures* v. *McFadyen* (1910), 11 C. L. R. 723 ". It is clear that this case goes further than *Measures* v. *McFadyen*. In *Cheyne's Case* the right of the lessee to the value of improvements is, in one sense, incidental to the lease as the time for payment was fixed as on determination of the lease. This might occur by effluxion of time or other means. It seems the decision would not apply to all

cases, for it would be impossible to apply this principle to a long term building lease.

In the case of *Roberts* v. *The District Land Registrar at Gisborne* (1909), 28 N. Z. L. R. 616, Edwards, J., affirmed the objection of the Registrar to a lease of native land containing a right of renewal presented for registration. At p. 616 he says : " The Registrar's ground of objection is that these provisions were not warranted by the law at the time when the lease was executed, and that subsequent legislation has not cured the defect. The Registrar, holding this view, has taken the proper course in refusing to register the lease, inasmuch as the rights given to the lessee under the provisions for renewal will, upon the registration of the lease, be entitled to the same protection as the term granted by the lease ".

It is true that Maughan, Acting J., in *Lewis* v. *Keene* (1936), 36 S. R. (N.S.W.) 493, at p. 506, says : " Messrs. Beckenham and Harris in their text-book at p. 125, make the statement that : ' registered estates and interests in land under the Act are created by statute and it would appear that they cannot be destroyed except by statutory methods '. The statement that estates are ' created ' by the Statute may require careful examination if it ever comes up for discussion, but it cannot apply to the present case. . . ." In this case a leasehold interest in land had been registered under the provisions of the Real Property Act, 1900. The freehold of this land had not been brought under the provisions of the Act. The leasehold and freehold estates subsequently became vested in one person. It was held that merger takes effect unless the transferee expressly or impliedly shows that he intends merger not to take place, or unless it is to his interest that it should not.

It is submitted that so far as this case infers that registration of a lease does not confer a statutory estate as well as a statutory title to the estate, the decision is inconsistent with the other cases. In *English, Scottish and Australian Bank, Ltd.* v. *Phillips* (1936), 57 C. L. R. at p. 323, in a joint judgment, Dixon, Evatt and McTiernan, JJ., refused to express an opinion on the issues determined by this case.

In the recent case of *Pearson* v. *Aotea District Maori Land Board*, [1945] N. Z. L. R. 542, a lease granted under purported statutory power by the defendant was held to be, apart from registration, void. The plaintiff was a *bona fide* purchaser for value of the lease which contained a right of perpetual renewal for periods of twenty-one years. The first term of the lease having expired, a new lease was executed by the lessor and the transferee and registered, but it did not contain the provision for perpetual renewal, a fact which the transferee did not realise at the time. The plaintiff brought an action claiming that the lessor rectify the lease by accepting a surrender thereof, and by issuing to him a new lease containing the like provision as to perpetual renewal. It was held that he was entitled to this relief. After holding that the right of renewal was an integral part of the estate shown by the Register as vested in the lessee and so its registration was authorised, Finlay, J., proceeds : " Certainly section 89 of the Act is confirmatory of that point of view because it prescribes that, upon registration of a transfer of a lease, the estate and interest of the

transferor as set forth in the instrument, with all rights, powers, and privileges thereto belonging or appertaining shall pass to the transferee. Regarded from that point of view the transferee, in this instance the plaintiff, would be regarded as becoming vested of the term with a right to its renewal. Confirmation of the soundness of this view is found in *Roberts* v. *District Land Registrar at Gisborne* (1909), 28 N. Z. L. R. 616, where Edwards, J., said : ' The Registrar, holding this view, has taken the proper course in refusing to register the lease, inasmuch as the rights given to the lessee under the provisions for renewal will, upon the registration of the lease, be entitled to the same protection as the term granted by the lease ' (*ibid.*, 617) ".

It is not proposed to consider, in this article, the registered interest of mortgage for that is not an estate strictly so called. In the absence, however, of further authority we may consider two decisions of the High Court of Australia on transfers of mortgages. It is submitted that these cases apply by analogy to transfers of registered leases. The similarity has been discussed earlier (*q*). These cases propound the conception of the statutory estate of mortgage, including all the accompanying personal obligations normally incident thereto, and the statutory vesting of all these by transfer. A joint judgment of Dixon, Evatt and McTiernan, JJ., in the later case discusses the similarity of mortgages and leases under the system.

It was held unanimously by the High Court of Australia (*r*) (Starke, Dixon and Evatt, JJ.) that the statutory transfer of a mortgage does not operate to give the transferee the right to sue a surety on a covenant of guarantee contained in the instrument of mortgage. It was inferred by Dixon and Evatt, JJ., in a joint judgment that the terms of the transfer, if appropriately drawn, might so operate, but in this event the words relied on must be pleaded. In referring to the provisions of the Real Property Act, 1900, of N. S. W. and sections 51 and 52 thereof (*s*), Dixon and Evatt, JJ., say, at p. 434 : " Such language is not incapable of including among the rights which pass to the transferee the benefit of the covenant by a surety who joins as a party in the instrument of mortgage for the purpose of giving the covenant. But, in our opinion, the language should not be so interpreted. The statute is concerned with dealings in land and it is because a mortgage involves such a dealing that the statute prescribes how mortgages may be transferred and with what consequences. It is concerned with the mortgage transaction in its entirety as it affects the land, and, therefore, extends to the personal liability of the mortgagor for the mortgage debt because that liability is intimately connected with the rights of property arising out of the mortgage transaction. A surety's obligation stands in a different relation to the dealing. His liability is introduced by way of additional security. It is personal and, except as a result of subrogation, does not directly or indirectly affect the land. Rights of subrogation are not of a kind falling within

(*q*) The Land Registration Act, 1925 (England), has separate provisions for the transfer of charges. These differ from the sections of the Act dealing with transfer of leaseholds, but this is not so under the Torrens system.

(*r*) *Consolidated Trust Co., Ltd.* v. *Naylor* (1936), 55 C. L. R. 423. This was also the unanimous view of the Full Court (Davidson, Street and Maxwell, JJ.) in the same case reported in (1935) 35 (N.S.W.) S. R. 575.

(*s*) These sections are set out in full in footnote (*p*).

the scope of the Real Property Act. A guarantee is thus collateral to the mortgage transaction and the circumstance that the obligation is expressed in the mortgage instrument must be regarded as accidental to the mortgage transaction and not as characteristic of the dealing contemplated by the legislation. In relation to transfers of mortgage, sections 51 and 52 should be understood as dealing only with rights, powers, privileges, debts and sums of money affecting the mortgage transaction as between mortgagor and mortgagee."

In *English, Scottish and Australian Bank, Ltd.* v. *Phillips* (1936), 57 C. L. R., at p. 321, reference was made to the similarity of registered leases and registered mortgages. A mortgagor subsequently paid off his mortgage, which was transferred to him and not discharged. He then transferred the mortgage, and was later sued on his personal covenant in the mortgage. Dixon, Evatt and McTiernan, JJ., say, at p. 321 : " Under the system of registration governing the present case, the statutory charge described as a mortgage is a distinct interest. It involves no ownership of the land the subject of the security. Like a lease, it is a separate interest in land which may be dealt with apart altogether from the fee simple or other estate or interest mortgaged. But, like a lease, it involves, or usually includes, personal obligations. It is impossible to treat the personal obligations in the same way entirely as the interest in land is treated by the registration system. The register cannot be made the source of information as to the fulfilment or performance of such obligations, and the question what rights they continue to confer may depend upon such matters. Thus, although a proposing transferee of a mortgage may rely upon the register for the existence and validity of the mortgage, he may be unable to depend upon anything but inquiries from the parties to ascertain how much of the principal sum remains unpaid (cp. *Nioa* v. *Bell* (1901), 7 A. L. R. 145, at p. 146). But, nevertheless, the plan of the legislation is to enable the proprietor to transfer by registration not only the interest in the land, but all the accompanying personal obligations normally incident thereto "; and at p. 324 the judgment continues : " But the Legislature is not obliged to respect theories of jurisprudence and, when it proceeds to deal with obligations on the analogy of property, it is not likely to do so. When section 151 of the Real Property Act, 1886, says that upon registration of a transfer of a mortgage, lease or incumbrance, the estate or interest of the transferor as set forth in the instrument transferred, with all rights, powers and privileges thereto belonging, including the right to sue upon and recover in his own name any debt, sum of money, annuity or damages under such transferred instrument, shall pass to the transferee, it means, we think, that they shall pass and be enjoyed as a congeries of separate and distinct rights which in turn may be alienated by him by means of a registered transfer ".

These decisions authoritative in themselves are, perhaps, made stronger by the unanimity of the judicial opinion which upon the issues being considered by us is complete, except for doubts in *dicta* expressed by Maughan, Acting J. It is submitted they support, either expressly or impliedly, the existence of the registered estate as a statutory estate.

Drawing conclusions from the foregoing facts it is submitted that, both under the English and Torrens systems, the registered estate of

leasehold is a statutory estate in every sense. *A fortiori*, and for the other reasons set out in these pages, it is submitted that, under both systems, the registered estate in fee simple in possession is a statutory estate. Both these registered estates differ, in greater or lesser degree, from and are properly distinguishable from the similar estates of the common law. One must bear in mind that the Land Registration Act, 1925 (England), recognises, but does not strictly observe, the nomenclature of registered conveyancing, and so partially clouds the issues. Subject to this slight handicap, nomenclature should never be confused. Registered estates should never be called " legal " estates, for " legal ", when used in that term, has by long and convenient custom now acquired a specific meaning and is not understood in the general sense of being enforceable in all Courts. Transfers should never be called conveyances. Other similar definitive terms of the two systems—registered and unregistered—should be similarly correctly used. Under those conditions, and they should be accepted as normal, the use of one term shows the system—registered or unregistered—under consideration. When cases from the two systems are being considered simultaneously the advantages become apparent.

MINISTERIAL DECISIONS AND NATURAL JUSTICE.

By T. A. BLANCO WHITE, Barrister-at-Law.

" Everybody should act fairly."—Mr. Justice Swift.

INTRODUCTION.

There have been several cases during the past year of applications to the Courts to quash decisions of various Ministers of the Crown. Such applications are no new thing; they occurred frequently before the War though they were rare during the War years. Nor has there been any great change in the manner in which the Courts approach such cases. A general review of the subject may, however, prove valuable at this stage, and on one point—the distinction between judicial and administrative acts of the Minister—there are indications that the law may be developing. It is to this point that the present article primarily relates.

In recent years, the cases we are concerned with have mostly been applications to the Court under Acts such as the Housing Act, 1936, which allows the High Court to review decisions of the Minister of Health where the applicant has been prejudiced by the Minister's exceeding his powers or failing to comply with the provisions of the Act. Other cases have been applications for certiorari. For our purposes, the distinction between these two classes of case is not of importance.

Since decisions of a Minister can only be attacked by proceedings of the nature of certiorari, it is not in itself a ground of attack that the decision concerned was wrong, either on the facts or on the law. The Court can only interfere if the decision or order concerned was

one that the Minister had no jurisdiction to make. In practice it may be by no means easy to draw the line between an error that involves an excess of jurisdiction and an error that does not, but the principle of law is clear. (The practical difficulty is well illustrated by the cases of *R.* v. *Minister of Health*, [1939] 1 K. B. 232, and *White and Collins* v. *Minister of Health*, [1939] 2 K. B. 838; these cases fell on opposite sides of the line and may usefully be compared when such a point comes up for decision.)

The safest ground of impeachment of any ministerial order is, consequently, that the express words of the statute concerned forbid the Minister to make it. Sometimes (though this is much harder) it is possible to persuade a Court that the words of the statute are such as to place an implied limitation on the Minister's powers, and that this limitation has been transgressed. A case of this type was *R.* v. *Farnborough U. C.*, [1920] 1 K. B. 234, where a local authority, having power to issue licences for the running of omnibuses, attempted to use this power for the purpose of controlling the fares to be charged by an omnibus company. The Court of Appeal held this to be *ultra vires*; the council, they said, could not " exercise powers not given to them by the statute by virtue of powers conferred upon them to issue licences ", and must not " take extraneous matters into account and allow themselves to be influenced by them ". The limited scope of this form of attack is, however, illustrated by *R.* v. *Minister of Transport*, [1927] 2 K. B. 401, where a licence to an omnibus company imposed minimum fares for the purpose of co-ordinating the omnibus services with a previously existing tram service. This the Court held to be legitimate, the co-ordination of services being a legitimate function of the authorities concerned. So in the recent case of *R.* v. *E. Kesteven R. D. C.* (1947), 63 T. L. R. 112, where the local authority acting under the Town and Country Planning Act, 1944, refused permission for the development of agricultural land as a stadium, on the ground of the overriding importance at the present time of retaining the land for food producton. The Minister of Town and Country Planning affirmed their decision. Dealing with an objection that food production was a consideration outside the scope of the functions of the Minister, the Lord Chief Justice said : " All the district council had said in the present case was that they would not consent to land being used for a purpose other than that of agricultural land. . . . That was clearly within the powers they had to refuse their consent to agricultural land being used for another purpose. Whether the land would be used for the purpose of raising food was another matter, but if they chose to keep land within their district as agricultural land, there was nothing in the Act which said that it was beyond their powers to do so. The rural district council were therefore within their powers in refusing consent . . . and it followed that the Minister was within his powers in upholding their decision ". There was consequently no excess of jurisdiction and certiorari would not lie. This line of cases will be mentioned again later.

The Question of Natural Justice.

It is a rule of the common law that a power to make quasi-judicial decisions is not validly exercised unless it is exercised fairly. As Lord

Selborne said in *Spackman* v. *Plumstead Board of Works* (1885), 10 App. Cas. 229, 240, in relation to a statute which required an architect to "decide" where the building-line came in a street: "He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the direction of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice". The rule applies to the decisions of Government Departments as well as to those of arbitrators and the like; it has been used in a long line of cases, of which the *Stevenage Case* forms a recent example, as a weapon for impeaching ministerial acts.

The leading statement of the rule, as applied to Government Departments, is to be found in the speech of Lord Loreburn in *Board of Education* v. *Rice*, [1911] A. C. 179, 182, where he said: "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing so they must act in good faith and listen fairly to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. . . . They can obtain information in any way they think best, always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statement prejudicial to their view. . . . The Board is in the nature of an arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari".

The matter was carried a stage further in *Local Government Board* v. *Arlidge*, [1915] A. C. 120. This related to an appeal to the board under section 17 of the Housing, Town Planning, etc., Act of 1909, from a closing order made by a local authority. The board adopted a procedure which has since become standard practice in such matters: a local public inquiry was held by one of the board's inspectors, who then reported to the board. The appellant was not allowed to see the inspector's report, nor was he allowed to present his case orally before the anonymous official who actually decided the appeal. He applied for a writ of certiorari on the ground that he had been denied natural justice. Lord Haldane, after citing the opinion of Lord Loreburn

quoted above, said: "When therefore Parliament entrusts [a Government Department] with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently"; and on the subject of decisions by anonymous officials: "The Minister at the head of the Board is directly responsible to Parliament like other Ministers. He is responsible not only for what he himself does but for all that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency. Unlike a judge in a Court he is not only at liberty but is compelled to rely on the assistance of his staff. When therefore the Board is directed to dispose of an appeal, that does not mean that any particular official of the Board is to dispose of it". Lord Shaw spoke as follows on the board's refusal to disclose the inspector's report: "The very same argument would lead to the disclosure of the whole file. It may contain, and frequently does contain, the views of inspectors, secretaries, assistants and consultants of various degrees of experience, many of whose opinions may differ, but all of which form the material for the ultimate decision. To set up any rule that that decision must on demand, and as a matter of right, be accompanied by a disclosure of what went before, so that it may be weakened or strengthened or judged thereby, would be inconsistent, as I say, with efficiency, with practice, and with the true theory of complete parliamentary authority for departmental action. This is, in my opinion, implied as the legitimate and proper consequence of any department being vested by statute with authority to make determinations.

"This conclusion is by no means changed by the circumstance of the determinations being, in point of fact, upon appeal from the deliverances of another or inferior authority".

Lord Shaw went on to explain the meaning of the term "natural justice" as meaning only that the board "must do its best to act justly"; while Lord Moulton was "unable to understand the meaning of the phrase 'contrary to natural justice' in connection with such a matter as is involved in the present case", and commented: "It is said, truthfully, that on such an appeal the Local Government Board must act judicially, but this, in my opinion, only means that it must preserve a judicial temper and perform its duties conscientiously, with a proper feeling of responsibility, in view of the fact that its acts affect the property and rights of individuals". Lord Parmoor expressed a similar view of the limits of quasi-judicial responsibility: "The power of obtaining a writ of certiorari is not limited to judicial acts or orders in a strict sense, that is to say, acts or orders of a Court of law sitting in a judicial capacity. It extends to the acts and orders of a competent authority which has power to impose a liability or to give a decision which determines the rights or property of the affected parties".

HEARING BOTH SIDES.

Clear and complete as this decision was, it left one point in need of further clarification. For there is something of a contradiction between the Minister's right to consult his files and the views therein set forth of "inspectors, secretaries, assistants and consultants of various degrees of experience", and his duty of "always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statement prejudicial to their view". This apparent contradiction has been removed by the distinction between administrative and judicial acts, drawn in later decisions.

That the Minister has some real obligation to allow both parties to present their case, was shown by *Errington* v. *Minister of Health*, [1935] 1 K. B. 249. It related to an appeal to the Minister from a closing order made by a local authority. A local public inquiry was held in the usual way, but after the inquiry was over the Minister accepted fresh evidence, *ex parte*, as to matters which had been discussed at the inquiry. This amounted, in the view of Lord Justice Maugham, to the Minister's holding after the public inquiry was over, "a private inquiry of his own to which one party only is admitted"; and Lord Justice Greer said: "It seems to me that in deciding whether a closing order should be made in spite of the objections which have been raised by the owners, the Minister should be regarded as exercising quasi-judicial functions. The effect of the closing order if confirmed would be to diminish greatly the value of the property owned by the objecting parties, and the decision of the Minister is a decision relating to the rights of the objecting parties and, in my view, it is a decision in respect of which he is exercising quasi-judicial functions". Thus the case was certainly one to which the decision in *Arlidge* applied. The learned Lord Justice then went on to say: "If, as I think, the Ministry were acting in a quasi-judicial capacity they were doing what a semi-judicial body cannot do, namely, hearing evidence from one side in the absence of the other side, and viewing the property and forming their own views about the property without giving the owners of the property the opportunity of arguing that the views that the Ministry were inclined to take were such as could readily be dealt with by means of repairs and alterations to the buildings". The Court therefore quashed the Minister's order.

In giving judgment in *Errington* the Court of Appeal had, however, made it clear that they did not mean that a Minister is at all times and in all matters in a quasi-judicial position. Any doubts on this score were soon removed. Whether as a result of the attention that local authorities were then giving to the housing question or of the encouragement that *Errington* gave to landowners, the Courts had plenty of opportunity in the following months for explaining what the decision in *Errington* really meant. In *Frost* v. *Minister of Health*, [1935] 1 K. B. 286, application was made to quash the Minister's order on the ground that before the clearance scheme concerned was finally worked out, the Ministry had advised the local authority as to the extent of the property to be included in it. Mr. Justice Swift rejected the application, saying: "From the moment an objection is made the Minister is exercising quasi-judicial functions, but it seems

to me to be clearly recognised by the Court of Appeal [in *Errington*] that up to the time of objection being made the Minister acts in an administrative, and not a judicial, capacity".

In *Offer* v. *Minister of Health*, [1936] 1 K. B. 40, 48, the problem was again considered by the Court of Appeal. As in *Frost*, the ground of complaint was that the scheme concerned had been discussed with the Ministry at an earlier stage, before the local authority made their order, and consequently, of course, before there was any objection to it or any appeal to the Minister. Lord Justice Greer distinguished his own judgment in *Errington* and approved Mr. Justice Swift's judgment in *Frost*, saying: "To my mind, Parliament intended that these semi-official duties should be conferred upon a Minister who naturally will have some knowledge of the matter before he begins his semi-judicial inquiry, and will possibly have had communications with the local authority before what I have called the '*lis*' is joined between the objecting property owners and the local authority, and who therefore will have some knowledge and will have given some opinion about the matter".

These decisions made it clear that the Minister only occupies any judicial position during a limited period of time, beginning at the moment when an issue is joined which the Minister will have to decide. In the following year, the Court of Appeal had occasion to point out that even during that limited period, the Minister is only obliged to act judicially towards the parties to a dispute, in so far as his acts relate to the matters in issue between them.

The point arose in *Horn* v. *Minister of Health*, [1937] 1 K. B. 164. The usual sequence of events had taken place: a compulsory purchase order by a local authority, an appeal to the Minister by objecting property owners, the holding of a local public inquiry followed by ministerial confirmation of the local authority's order, and an application to the High Court to quash the Minister's order. The application was based, as in *Errington*, on communications between the Ministry and the local authority between the date of the local public inquiry and the date of the confirming order: the Ministry had in fact received a deputation from the local authority between those dates. There was, however, one important difference from *Errington*: while the deputation had admittedly discussed housing matters in general, they had not discussed this particular compulsory purchase order. The Court rejected the application. Lord Justice Scott pointed out that *Errington* only applied where the Minister had "in effect heard one side in the absence of the other side on the subject-matter of the inquiry, which was still sub judice", and added: "Where public departments are given under this type of Act quasi-judicial duties as well as administrative duties, the need of their carrying out their quasi-judicial duties in strict accordance with natural justice must always be considered in the light of their administrative duties also . . . Parliament must be taken quite deliberately to have decided that the carrying out of [the Minister's] administrative duties under the Act is compatible with the exercise of his quasi-judicial functions. . . . To have postponed the consultation [with the deputation from the local authority] would have been contrary to the policy of Parliament expressed in the 1935 Act. Unless, therefore, it was a case of the mere discussion of

the question, upon which the consultation was to be held, prejudicing the fairness of his decision under the quasi-judicial duty which he was also in course of performing, I am clearly of opinion that he was free to carry out his administrative duty and see the deputation ".

This same point, that it is only in so far as a " *lis* " has been raised before the Minister that he need act judicially at all, was emphasised by the Court of Appeal in *Robins* v. *Minister of Health*, [1939] 1 K. B. 520. This again was a dispute about the Minister's confirmation of a compulsory purchase order. There was, however, no dispute as to the property concerned being slum property, which ought to be cleared: the applicants had bought the property for the express purpose of clearing and redeveloping it. Since, however, the houses on the property were controlled under the Rent Restriction Acts, the applicants could not proceed with their plans until the local authority made a clearance order. Instead of making the clearance order asked for the authority, following their usual practice, made a compulsory purchase order, which the Minister duly confirmed. The applicants complained to the Court that in the circumstances a compulsory purchase order could not be necessary in order to get the property cleared, and was unjust and inequitable. The Court rejected the application. Lord Justice Slesser dealt with the contention that the Minister was bound to act judicially in such a case, by analysing Lord Justice Greer's judgment in *Errington*; he quoted the passage which I have quoted above and went on to say: " But . . . where there is no objection before the Minister, that is to say, no objection which is an arguable objection, producing a *lis* between the parties, the position is this: ' In so far as the Minister deals with the matter of the confirmation of a closing order in the absence of objection by the owners it is clear to me, and I think to my brethren, that he would be acting in a ministerial or administrative capacity, and would be entitled to make such inquiries as he thought necessary to enable him to make up his mind whether it was in the public interest that the order should be made '. In my view . . . this was a case where the Minister was entitled, on the facts, to act ministerially. I do not think, having regard to the objections made, which seem to me to be objections that cannot properly be taken under the statute, that there was any *lis* before the Minister at all ".

It was also argued in *Robins*, that the local authority and the Minister were bound in any event to use their powers so as not to injure the applicants, and so could not make a compulsory purchase order while the same result could be obtained by a clearance order. This argument was based on the rather confusing line of cases whose result may be expressed in the words of Lord Atkinson in *Lagan Navigation Co.* v. *Lambeg Bleaching, etc., Co.*, [1927] A. C. 226, 243: " If a man or a public body have statutory powers which he or they may at will exercise in a manner hurtful to third or in a manner innocuous to third parties, that man or body will be held to be guilty of negligence if he chooses or they choose the former mode of exercising his or their powers and not the latter, both being available to him or them ". The Court of Appeal in *Robins* were not prepared to hold that the Minister's power to act administratively was limited in any

such way as the applicants contended. Lord Justice Slesser distinguished the *Lagan Navigation Case* by saying: "Though a person must act reasonably, yet if he is authorised to do a specific act under an Act of Parliament, he can do that specific act notwithstanding that it may do injury to another. Here the corporation are expressly authorised to purchase. The mere fact that their purchase may or may not cause injury to another, does not seem to me to interfere with the discretion which they have as to which order they may make, subject, of course, always, to confirmation by the Minister". Lord Justice Finlay said: The Court can only interfere if the order is *ultra vires* or the requirements of the Act have not been complied with, and "here the local authority are expressly given power to do one of two things, whichever they like".

Prejudging the Issue.

Not only is the Minister entitled to approach the matters he has to decide with some previous knowledge, but he is also entitled to enter upon his judicial duties having already reached a tentative conclusion on the points before him. This follows from the decision in *Re Manchester* (*Ringway Airport*) *Compulsory Purchase Order* (1935), 153 L. T. 219. This was an application to the Court to quash an order by the Secretary of State for Air, confirming the decision of the Manchester Corporation to purchase land for use as an airport. The governing statute was the Public Works Facilities Act, 1930, which prescribes substantially the same procedure as the housing legislation under which most of the other cases here cited were decided. One ground of objection to the order was that during preliminary discussion of the scheme, the Air Ministry had expressed tentative approval of it and had encouraged the Manchester Corporation to proceed with it. The Air Ministry letter in which this approval was expressed had, however, pointed out that the views expressed were only tentative, adding: "It may be necessary to hold a public inquiry, the results of which will possibly influence to a marked degree the views finally adopted by the Air Ministry". Branson, J., held that such an expression of opinion did not render the Ministry "unfit to adjudicate". "The question", he said, "is really one of fact, namely, did what was done make it impossible or even unlikely that the Minister could bring a judicial mind to bear upon the matters in issue between the parties? In my opinion, it did not".

That the Minister would not disqualify himself from acting judicially merely by expressing an opinion beforehand, followed in any case from the view stated by Lord Loreburn in *Board of Education* v. *Rice*, and quoted above, that the Minister is "in the nature of an arbitral tribunal". For it was already settled that this was true of an arbitrator. Thus, in *Jackson* v. *Barry Ry.*, [1893] 1 Ch. 244, a contract for the construction of a dock included a term that disputes arising were to be decided by the railway company's engineer. A dispute arose as to the construction of the specification for the work, and the matter was argued in correspondence between the contractors and the engineer (as representative of the railway company), before the engineer held a formal arbitration. The engineer maintained in

the course of the correspondence that the railway company were right and the contractor was wrong. The contractor attempted to get the arbitration set aside by the High Court. In the Court of Appeal, Lindley, L.J., said: "Unless we can draw the inference that the engineer has precluded himself by this letter from keeping his mind open, and from deciding according to the evidence and according to the advice which might be given him, we ought not, in my opinion, to stop this arbitration". Bowen, L.J., said: "The contractor certainly had a right to demand that whatever views the engineer might have formed, he would be ready to listen to argument and at the last moment, to determine as fairly as he could, after all had been said and heard. The question in the present appeal is, whether the engineer of the company has done anything to unfit himself to act, or render himself incapable of acting, not as an arbitrator without previously formed or even strong views, but as an honest judge of this very special and exceptional kind".

FOUR POST-WAR CASES.

Since the war, there have been four more decisions on this subject of the judicial character of ministerial decisions. They provide valuable restatements of the law, but except at one point they carry it no further. Even on this one point, they do no more than echo a dictum in *Errington*. One of them, however (the decision in the *Stevenage Case*) does to some extent break new ground.

The first of the four is *Stafford* v. *Minister of Health*, [1946] K. B. 621. This was the usual compulsory purchase order case, except that the Minister had exercised the power given him by section 2 of the Housing (Temporary Provisions) Act, 1944, to dispense with a local public inquiry. He was, however, still required to "consider" any objections to the order that might be made. The applicants delivered a statement of objections, which the Minister sent to the local authority for their comments; but he did not communicate further with the applicants except to inform them that he had confirmed the compulsory purchase order. Mr. Justice Charles said: "Mr. Parker, for the Minister, contends that that statement of objections is the appellant's case. I do not think that it is. It is only a fulfilling of the duty to object which rests on him if he desires to resist the compulsory purchase order. . . . All the grounds of objection, certainly the last, require implementation. They are mere statements, and give the rural district council no information. They are what they set out to be, grounds of objection and nothing more. . . . On the one side, the Minister had simply the appellant's naked grounds of objection, and on the other the council's detailed answer raising matters—I assume by way of answer to the objections—which are patently controversial. That answer was never communicated to the appellant . . . Accordingly, I am bound to come to the conclusion that the Minister did not hear both sides before he confirmed the order". It had been admitted, on behalf of the Minister, that he was bound to act quasi-judicially in considering the objections. The decision in this case has been subjected to a good deal of informal criticism, but on the view he took of the facts the learned Judge was clearly bound by *Errington* to reach the conclusion he did.

The next of the four cases was *Miller* v. *Minister of Health*, [1946] K. B. 626. It was another compulsory purchase order case, and again the Minister dispensed with a local public inquiry. The applicant had objected to the purchase of his property on various grounds, the most substantial of which seems to have been that there was plenty of other land the local authority could have bought instead. The Minister confirmed the order without further communicating with the applicant, and without making the mistake he had made in *Stafford*, of referring the statement of objections to the other side for comment. The Court would seem in any event to have been bound by *Robins* to hold that the Minister was justified in acting as he did; but Mr. Justice Henn Collins apparently preferred to decide the case on more general grounds. His judgment is consequently a valuable summary of this aspect of the law.

The learned Judge said: "The question what a Minister shall or shall not do when acting administratively is not one that can be determined on any principle of law, nor yet on any principle, as I see it, of natural justice, as between the Minister and any one member of the community. The Minister acting in his administrative capacity is governed by considerations of expediency only. He has to decide—ultimately, I suppose, subject to the review and governance of Parliament—what in his view is best for the community. No principle of natural justice as between any individual and the Minister of the Crown has any place in that kind of administration, but when questions as to whether those administrative powers should be exercised have been referred to him by Act of Parliament, in this case the Housing Act, 1936, at that point he has to consider judicially the matter that is so brought before him.

"That does not mean, as the authorities have shown, that he is not to use any knowledge which has come to him, so to speak, extra-judicially, but all the materal which has been formulated for his judicial consideration must be available to him on both sides. That is the meaning of his acting with natural justice in a judicial capacity".

The learned Judge distinguished *Stafford* as follows: "It was contrary to natural justice to obtain a reply from one of the parties in the absence of the other, so that the other had no chance for comment or discussion of any sort. It was clear on that state of facts that the Minister was not accepting, as going without further discussion, the matter that the appellant had set forth in his notice, because it must have seemed to the Minister that such matter required some reply from the council . . . here there is nothing to show that the Minister was not in fact accepting everything the appellant was saying in his notice of objection, but despite that acting administratively. I started by pointing out that there are no limitations imposed by natural justice on the action the Minister takes administratively, and I do not think it can possibly be said in this case that his failure to allow the appellant to elaborate what he said in his notice is contrary to natural justice or that on that ground the order should be quashed".

The third case, *Price* v. *Minister of Health*, [1947] 1 A. E. R. 47, 45 L. G. R. 13, again falls directly under one of the earlier authorities: this time, *Offer*. The files of the Ministry contained certain documents, more or less relevant to the matters in dispute, which were not

disclosed at the public local inquiry. Mr. Justice Morris followed *Offer*, but used language which followed not so much the judgments in that case, as Lord Shaw's opinion in *Arlidge*; he said: "Many documents must come into the possession of the Minister while he is acting administratively and before a time when he enters upon semi-official duties, or, to use the language of Lord Justice Greer [in *Offer*] 'before . . . the *lis* is joined between the objecting property owners and the local authority'. The Minister, it seems to me, must enter upon his quasi-judicial duties with much knowledge acquired administratively".

So far there is nothing new in these cases; but Mr. Justice Morris accepted a statement of the law that went rather beyond the earlier decisions. He assented to the view that "the Minister of Health must at some stages be acting purely administratively, that there will come a time when he will be acting in a quasi-judicial capacity, and that thereafter he may again enter upon a period when he is acting administratively". Still this was not really new; Lord Justice Maugham had said in *Errington*: "My conclusion is that although the act of affirming a clearance area order is an administrative act, the consideration which must precede the doing of that act is of the nature of a quasi-judicial consideration, and the Minister is bound to the extent mentioned by the House of Lords in the *Board of Education* v. *Rice*". This same view, that in the actual making of his order (as distinct from the preliminary consideration of objections to it, etc.) the Minister acts administratively, is indeed implicit in *Robins*, in *Miller*, and in the line of cases mentoned earlier of which *R.* v. *Kesteven R. D. C.* is the most recent example.

THE STEVENAGE CASE.

Lastly, there was the Stevenage case: *Franklin* v. *Minister of Town and Country Planning* (1947), 63 T. L. R. 143, and *Times* newspaper, 21/3/47–25/3/47. This case arose under section 1 of the New Towns Act, 1946, which provides:

"(1) If the Minister is satisfied, after consultation with any local authorities who appear to him to be concerned, that it is expedient in the national interest that any area of land should be developed as a new town by a corporation established under this Act, he may make an order designating that area as the site of the proposed new town".

Sub-section (2) provides that the procedure for making the order is to be that laid down in Schedule I to the Act, which in turn prescribes what is in effect the customary procedure of a local public inquiry, the report whereon is to be "considered" by the Minister before he makes his order. There are the usual provisions for quashing an order if it is not within the Minister's powers, or if anyone has been substantially prejudiced by the Minister's failing to comply with the provisions of the Act.

A scheme for a new town at Stevenage was prepared, objections were raised to it, a local public inquiry was held, and the Minister confirmed the scheme. The objectors applied to the Court to quash the Minister's order; the case coming first before Mr. Justice Henn Collins (who it will be remembered had decided *Miller*) and then before the Court of Appeal. There were two substantial grounds for this

application. The first related to the form of the public inquiry: it was contended that the Minister ought to have produced witnesses in favour of the scheme, for the objectors to cross-examine. The second was based on a claim that the Minister was biased: that is, that he had prejudged the issue.

It is important to note that this case only in part belongs to the line of authorities we have been considering. Notwithstanding the extreme similarity of the provisions for the making of objections, and the holding of an inquiry into them, to the provisions of (say) the Housing Act, 1936, the position is not really the same. In proceedings under the New Towns Act there is not really a "*lis* between parties", which the Minister must decide: the only possible "parties" are the opponents, and the Minister himself. This point proved important to both the grounds, on which the Court was asked to quash the order. Further, the Minister's jurisdiction to make an order under the Act is limited only by the requirement, that he must be "satisfied . . . that it is expedient in the national interest". His position in fact resembles not so much that of the Minister of Health in the cases already cited, as that of the Home Secretary who has to decide whether a suspect ought to be interned under the Defence Regulations: a matter which came before the House of Lords during the War.

So far as concerned the objection based on the form of the public local inquiry, the absence of a "*lis*" proved decisive. The same point had in fact already been considered by a Divisional Court in the "Kingston Bypass Case": *Re Trunk Roads Act*, 1936, [1939] 2 K. B. 515. There also the Minister had held a public local inquiry into objections to a scheme which he himself had promoted, but had not called any witnesses in support of the scheme. Lord Hewart, reading the judgment of that Court, had said: "No evidence was called on behalf of the Minister, and as the object of the inquiry was to hear objections to the proposals it was not essential that evidence should be called on his behalf. It was for the objectors to state their objections and to call such evidence as they might think proper in support of those objections". This decision was of course not binding on the Court of Appeal that decided *Franklin*, but they adopted Lord Hewart's words as applicable to the New Towns Act. Unless the House of Lords should overrule them, it must now be considered established, that the Minister who promotes a scheme under such an Act, need not make any of those concerned with the scheme available for cross-examination at the local public inquiry.

In so far as *Franklin* was concerned with bias on the the part of the Minister, there turned out to be little disagreement as to any relevant point of law. In particular, the question whether the Minister was at any stage required to act "quasi-judicially", or whether he was throughout acting "administratively", did not arise. The Minister was obliged to cause a public local inquiry to be held and to "consider" the report of it; this was admitted to mean, "consider with an open mind". Lord Justice Morton summed up the Minister's obligations as being "to consider with a perfectly open mind the report of the public local inquiry and any other material which might have come to his notice . . . and to decide in good faith

whether it is expedient" to make the order. Lord Justice Tucker pointed out that "bias" in such a connection meant "absence of *bona fides* . . . determination to approach the matter with a closed mind". Lord Oaksey treated the terms "fair", "fair-minded", "open-minded", "*bona fide*" and "unbiased" as being equivalent descriptions of the conditions with which the Minister must comply in making his order.

The evidence adduced to show that the Minister was biased, consisted mainly in two statements made by him: a public speech at Stevenage while the New Towns Bill was before Parliament, and a letter written at the time when he confirmed the scheme giving his reasons for confirming it. It was contended that the speech alone, showed a degree of bias sufficient to disqualify that particular Minister from ever making an order under the New Towns Act in respect of Stevenage, notwithstanding that the speech was made before Parliament expressly conferred the power to make such orders upon him. In Lord Oaksey's words, however, "Mr. Justice Henn Collins had been right in holding that the onus was on the objectors to show that the Minister had not an open mind when he made the order. Even assuming that the Minister had been biased when he made his speech at Stevenage, it was still necessary to show that that state of mind continued until he made the order".

Where the Court of Appeal differed from the Court below, was in their view of the evidence that the Minister was biased at the time of the order: Mr. Justice Henn Collins was convinced by it, while the Court of Appeal held it to be no evidence at all. The case thus reduced, on this issue, to little more than a question of pure fact, on which the last word may rest with the House of Lords. Inasmuch as this type of case is relatively new, however, some further discussion may help to put it into its true perspective.

It was pointed out at the beginning of this article, that the only ground on which Minister's quasi-judicial orders can normally be attacked with success, is that they are *ultra vires*, or in other words, that there was no jurisdiction to make them. In the cases of *Liversidge* v. *Anderson* and *Greene* v. *Secretary of State for Home Affairs*, [1942] A. C. 206 and 284, the House of Lords had to consider such an attack in connection with a Regulation giving the Minister the same sort of discretion as is given by the New Towns Act. Lord Maugham summed the position up in *Greene*: "My Lords, a somewhat similar appeal to this House in *Liversidge* v. *Anderson* has just been decided. It was based on an order of detention made by the Secretary of State under Regulation 18B of the Defence Regulations and it raised the same question as to the true construction of the words "If the Secretary of State has reasonable cause to believe", etc. Your Lordships decided that the words, in the context in which they are found, refer simply to the belief of the Secretary of State based on his view as to there being reasonable cause for the personal belief which justifies the detention order". Notwithstanding certain *obiter dicta* of Mr. Justice Henn Collins in *Franklin*, the discretion given to the Minister by the New Towns Act is thought to be just as wide. Lord Maugham continued: "Your Lordships also expressed the opinion that the Secretary of State could not be called on to disclose his

information or grounds of belief if he took the view that it would be contrary to the public interest to do so". The result, as Lord Maugham had said in *Liversidge*, was to make any *bona fide* order of the Minister substantially unassailable: "It would be useless to attempt to examine the truth of the fact alleged in the order in a case where the fact relates to the personal belief of the Secretary of State, formed partly at least on grounds which he is not bound to disclose".

The extreme difficulty of showing that a Minister has exceeded his jurisdiction in such a case, is well illustrated by the rare cases in which such a contention has succeeded. One such case was *Roberts* v. *Hopwood*, [1925] A. C. 578. In that case the House of Lords declared that there had been an illegal exercise of a local authority's power to pay such wages "as they think fit". They were enabled to reach that conclusion, because the local authority had provided evidence as to the basis on which they calculated what wages to pay. It was clear from the evidence that they had acted, not on reasonable grounds, but (as Lord Atkinson put it) according to "some eccentric principles of Socialist philanthropy". The necessary facts, that is, were before the House.

Another case illustrating this matter is the "Plymouth Plan" case: *Phœnix Assurance Co., Ltd.* v. *Minister of Town and Country Planning* (1947), 63 T. L. R. 139, which was decided by Mr. Justice Henn Collins on the same day as *Franklin*. This was a case under the Town and Country Planning Act of 1944, s. 1 (1), which provides that: "Where the Minister is satisfied . . . that it is requisite, for the purpose of dealing satisfactorily with extensive war damage in the areas of a local planning authority, that a part or parts of their area . . . should be laid out afresh and redeveloped as a whole", the Minister may on the application of the authority, make an order declaring "all or any part of the land in such a part of their area to be land subject to compulsory purchase . . . ". There are the usual provisions for objections and inquiries. In this case, the area concerned had one large, undamaged modern building, belonging to the applicants, in the middle of it. The authority proposed to leave that building untouched, but included its site in their draft of the order. The applicants objected that this made the order *ultra vires*, a contention that the Court upheld. It was apparently decided that an area was not "laid out afresh" unless all the buildings on it were pulled down and all the streets moved; and it was then clear on the face of the local authority's scheme, that the Minister could not possibly have been "satisfied".

In *Franklin*, there was no such way in which the nature and extent of the Minister's satisfaction could be gauged, and the opponents did not contend that he was not satisfied in fact: since the materials before him were not available, the contention could hardly have succeeded. Their argument that the Minister had already disqualified himself by his speech before the Act was passed avoided these difficulties, but involved asking the Court, in effect, to presume on the evidence of the speech that the Minister was acting in bad faith six months later, and this the Court was not prepared to do. An attack on the good faith of a Minister is never easy to sustain, notwithstanding that such attacks succeeded in *Errington* and in *Stafford*; indeed, Lord Atkin

went so far as to say, in his minority speech in *Liversidge* and *Greene*: "Who could dispute that the Secretary of State acts in good faith, or disputing it hope to prove the opposite?"

The attack on the Minister, that was accepted by Mr. Justice Henn Collins in *Franklin*, proves on examination to be the hardest to sustain of all. For while it does not involve directly, investigating whether the grounds on which the Minister satisfied himself that his order was expedient were reasonable grounds, it amounts to saying this: those grounds cannot possibly have been reasonable, so that the Minister cannot possibly have been acting in good faith. In *Franklin*, it involved deducing lack of good faith on the part of the Minister, from a finding that he made his order "trusting that some solution would be found" to the problem of how to provide water for Stevenage and dispose of the effluent from its sewage works. It can seldom be possible to say with certainty, that there cannot possibly have been information available to the Minister, which justified him in overruling the objections to his scheme, raised at the public local inquiry.

There is one other way of attacking such an order, but it seems hardly more promising: to ask to cross-examine the Minister on his affidavits in the case, hoping that he will admit to having been biased. No doubt this will be attempted in due course: the Court of Appeal in *Franklin* indicated clearly, that such cross-examination could be allowed.

It is also worth noting, that Mr. Justice Henn Collins' decision in *Franklin* was based (as was the decision in *Roberts* v. *Hopwood*, mentioned earlier) on information supplied by the Minister. As the learned Judge put it: "If objections have been raised which in the Minister's honest opinion are met by other material, albeit extra-judicial, he may overrule the objections and the objectors cannot complain. And if he says nothing, but simply confirms the order, this Court might have little, if any, ground for saying that he had not acted fairly in the light of all his information". If the Minister "takes refuge in silence", so as not to provide the Court with the assistance that came from the Minister's statement of his reasons in *Franklin*, his decision is unassailable. And one may add, if silence is inexpedient, cautious phrascology such as that of the Air Ministry letter quoted in connection with the *Ringway Airport Case*, will almost always suffice. For one reason and another, then, successful attacks in cases like *Franklin* are bound to be very rare. Their occasional occurrence cannot alter the fact, that it is of the essence of our system of ministerial decisions, that the real reasons for a decision cannot be reviewed judicially, and need normally never be published at all. It may well be that this feature is inevitable in any system of administrative law.

SUMMARY OF CONCLUSIONS.

In consequence of the judicial decisions cited above, it is submitted that the duties of a Government Department entrusted with quasi-judicial functions may be summarised as follows.

1. The order made must be one that is in fact, and not only in the opinion of the Department, one that it is within the Department's jurisdiction to make or reach. In some statutes, however, the limits of this jurisdiction are defined solely by reference to the personal opinion of the Minister in charge of the Department.

2. The Department may carry out its normal functions in its normal way, notwithstanding that it is handling matters on which a quasi-judicial decision may later be necessary.

3. As soon as a dispute arises which the Department must settle judicially, their officials must act in accordance with the essentials of justice: but only so far as the parties to and the issues involved in the dispute are concerned.

4. In particular, the official who actually decides the dispute may already have formed an opinion as to those issues, and may make his decision with his ordinary files before him, but while deciding he must open his mind afresh to the arguments on both sides, and try to reach a fair decision on those arguments. In other words, he must be an honest judge, though not necessarily an impartial one.

5. Both sides must be given adequate opportunities of some sort for putting their case before the Department.

6. A fair decision having been reached on the issues in the dispute, the Department may proceed, so long as it acts in good faith, to make any order that the decision reached leaves it with power to make.

STRICT LIABILITY.

SOME REFLECTIONS UPON *READ* v. *J. LYONS & CO., LTD.*

By E. O. Walford, LL.D., Solicitor.

It has never been possible to say, with any degree of certainty, whether the rule in *Rylands* v. *Fletcher* is a manifestation of the operation of the branch of law known as trespass or of nuisance, or whether it is *sui generis*. It has been the practice of text-book writers to deal with that rule under the heading of nuisance; but the defences which are available in respect of nuisance are not, as the law stands, considered to be fully available in relation to cases which fall within the doctrine of *Rylands* v. *Fletcher*. It would have been pleasant indeed if the House of Lords had found it possible in *Read* v. *J. Lyons & Co., Ltd.*, [1946] 2 A. E. R. 472, to reduce *Rylands* v. *Fletcher* to some sort of logical basis, but it is clear that it has not done so. The Court of Appeal has, at least on one occasion, when escaping from the task of clarifying certain branches of the law, stated that it has avoided the task with gladness. It may be that their Lordships felt that it was impracticable to reduce to a rational basis the rule in *Rylands* v. *Fletcher*, even if it would have given them pleasure to do so. However this may be, Lord Macmillan delivered himself of the following observation:—

> Your Lordships' task in this House is to decide particular cases between litigants, and your Lordships are not called on to

rationalise the law of England. That attractive, if perilous, field may well be left to other hands to cultivate. It has been necessary in the present instance to examine certain general principles advanced on behalf of the appellant because it was said that consistency required that these principles should be applied to the case in hand. Arguments based on legal consistency are apt to mislead, for the common law is a practical code adapted to deal with the manifold diversities of human life.

The practitioner has, however, to endeavour to apply rules of law; and in order to do so it is essential that he should, so far as possible, understand the basis of any rule which he seeks to apply to particular circumstances. It may therefore be useful to consider how the doctrine in *Rylands* v. *Fletcher* now stands; for it is certain that it does not stand where it did prior to the decision of the House of Lords in *Read* v. *J. Lyons & Co., Ltd., supra.* The facts in that case were stated with admirable conciseness by du Parcq, L.J., in the Court of Appeal, [1944] 2 A. E. R. 98, as follows: "The appellants in this action were in occupation of a factory at which high explosive shells were made. They managed the factory and controlled the manufacture of the shells. They admit that high explosive shells are 'dangerous things'. The respondent worked in the factory, though not as a servant of the appellants, and while she was there her position was that of an invitee. On an occasion when she was present in the factory a shell exploded whereby she suffered injuries. No negligence on the part of the appellants was proved or alleged. It is consistent with the case pleaded, and with the evidence, that they took the utmost care for the respondent's safety".

Neither the Court of Appeal nor the House of Lords considered that the rule in *Rylands* v. *Fletcher* applied in those circumstances. The main ground of the decision was that that rule does not apply where there is no escape from the premises. It is not, I think, rash to say that if the respondent had succeeded, *Read's Case* would have been tantamount to a ruling that employers had become in law the insurers of the safety of their employees in all cases where the work done on the employers' premises was within the rather nebulous class of "dangerous operations".

Whatever may be the desirability of such a rule, it is not the law of England at the present day, despite the statutory provisions concerning insurance of employees.

The aspects of the rule in *Rylands* v. *Fletcher*, which were considered by their Lordships in *Read's Case*, may conveniently be dealt with under various headings; but, before dealing with their Lordships' opinions, it may be worth while considering why it was thought in *Rylands* v. *Fletcher* that a person who, for his own purposes, brings on his land and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape, notwithstanding that the escape took place without any negligence on his part.

In *Rylands* v. *Fletcher*, Blackburn, J. (whose judgment was approved without qualification in the House of Lords), after referring to accidents on highways, whether by land or sea, and stating that

those who go on the highway, or have other property adjacent to it, may well be held subject to a risk of injury from that inevitable danger, and that persons who, by licence of the owner, pass near warehouses where goods are being raised or lowered are subject to the inevitable risk of accident, stated that it was believed that " all the cases in which inevitable accident has been held an excuse for what *prima facie* was a trespass can be explained on the same principle, *viz.*, that the circumstances were such as to show that the plaintiff had taken that risk upon himself ". His Lordship added that there was no ground for saying that the plaintiff in *Rylands* v. *Fletcher* took upon himself any risk arising from the usage to which the defendants should choose to apply their land. Thereafter he expressed the view mentioned in the last preceding paragraph.

There is no reasonable doubt that, subject to certain limited exceptions, inevitable accident, which presupposes the absence of negligence, is in modern law a defence in relation to a claim in trespass to which branch of the law Blackburn, J. (and Lord Cairns in the House of Lords) referred for illustrations. Blackburn, J., however, clearly considered that inevitable accident was not an answer to an action for trespass. May the true explanation of the very unsatisfactory decision in *Rylands* v. *Fletcher* be that Blackburn, J., had mistakenly considered that that point was settled? The fact is that the question whether inevitable accident was a defence to an action for trespass had not been settled even by the time that *Rylands* v. *Fletcher* came before the House of Lords on appeal in 1868. It will be seen on reference to the decision in *Stanley* v. *Powell*, [1891] 1 Q. B. 86 (*a*), that Denman, J., before summing up the case to the jury, called the attention of the parties to the doctrine which seemed to him to have been laid down in some other cases that despite the absence of negligence an action of trespass might lie. The question of negligence was left to the jury, by whom it was negatived, and, having heard argument, his Lordship delivered a judgment in which he considered the earlier authorities, and, in particular, the decision of the Court of Exchequer in 1875 in *Holmes* v. *Mather*, L. R. 103 Ex. 261, in which Baron Bramwell refers to the earlier decisions on case and trespass, and states that if the act that does an injury is an act of direct force *vi et armis*, trespass is the proper remedy (if there is any remedy) where the act is wrongful either as being *wilful* or as being *the result of negligence*; but that where the act is not wrong for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful. The case of *Holmes* v. *Mather* has been taken as settling the law, and it is supported by *Stanley* v. *Powell*, *supra*, in which Denman, J., again reviewed the authorities, and considered that it was settled law that inevitable accident is a good defence to an action for trespass. If Blackburn, J., or the House of Lords had considered that proof of absence of negligence on the part of the defendants or their contractors was a defence to an action for trespass it seems difficult to think that they would have used the words which they did, though it must be appreciated that it was clear from the

(*a*) If it be objected that this was not a case of trespass to land, the reply is that the cases of trespass to which Blackburn, J. referred did not relate to trespass to land but to the person.

facts that the defendants' advisers had been negligent. The real question was whether the innocent defendants could escape liability unless they could plead act of God or of the King's enemies or the default of the plaintiff or something of that kind; but no excuse of that kind could be advanced by the defendants, so that the question of inevitable accident was not really in point. It had been found that the negligence of the defendants' contractors was the cause of the damage. The trouble which *Rylands* v. *Fletcher* has caused to subsequent generations is due to the fact that Blackburn, J., chose to ignore that aspect of the matter and to suggest (a) that the defendants were liable to prevent the escape of the water " at their peril "; (b) that the defendants were " *prima facie* answerable " for the damage; (c) that they could excuse themselves " by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major* or the act of God (d) that as nothing of that kind existed *it was unnecessary to inquire what excuse would be sufficient*, thus leaving open the question whether the defendant might have escaped liability if he had proved that there was in fact no negligence on his part, whilst hinting by citations from older cases that such an excuse would probably not suffice, and finally (e) that as there was no need for the plaintiff to prove that the defendants were negligent there was no point in considering whether the defendants would be liable for their contractors' negligence, because that point could only have arisen if it had been necessary for the plaintiffs to allege and prove negligence.

In these circumstances, although *Rylands* v. *Fletcher* must be treated as settling the law in the cases to which it extends, it is not unnatural that modern Judges should have sought to avoid the extension of this rule of strict liability wherever it was possible to do so. So unpopular is the rule, that Lord Justice Lindley, many years ago, declared that it was not to be extended as far as strict logic might require, and that if so extended it would be a very oppressive decision. Is such a pronouncement tantamount to the expression of the view that the rule is itself illogical? If not is there any reason why the Courts should not apply it in all cases where it might logically be applied? Before leaving the question of trespass it may be mentioned that in *Read's Case*, Viscount Simon, L.C., stated that cattle trespass was a case of pure trespass to property and thus constituted a wrong without any question of negligence. That this proposition is true of cattle trespass is not to be doubted; but if it is to be understood as a general proposition that no trespass can be excused by proof of inevitable accident, as distinct from mistake (inevitable or otherwise) it would seem difficult to trace any entirely satisfactory authority for that proposition in modern law; and if a case could now occur in which the question of inevitable accident arose in respect of a trespass to property, powerful arguments could be advanced in support of the view that no liability arises in the absence of negligence: cf. *Salmond on Torts* (6th ed.), p. 222, *Winfield*, 42 L. Q. R. 37; *Holmes on the Common Law*, p. 89; *Stanley* v. *Powell*, *supra*. It may not be necessary to *plead* negligence in an action of trespass, but that does not prove that inevitable accident is no defence. However, although so much was said of trespass in *Rylands* v. *Fletcher* the circumstances

there, as Viscount Simon also observed in *Read's Case*, "did not constitute a case of trespass because the damage was consequential, not direct".

Dangerous Activities.

It would appear from *dicta* of their Lordships in *Read* v. *J. Lyons & Co., Ltd., supra*, that, in general, no distinction is to be drawn between the legal obligations of persons who carry on normal trades or businesses, and of those who conduct hazardous operations upon their premises, provided that they do not permit anything to escape from those premises. In this connection "escape" normally (*b*) means lateral escape. According to their Lordships' views in *Read* v. *J. Lyons & Co., supra*, no distinction is to be taken in relation to the possibility of liability according to the degree of danger attendant upon an activity conducted upon land or premises. If a person is carrying on a dangerous business, he must take reasonable care, so that he may avoid injury to the person or chattels of others, if a reasonably careful person could and would have avoided it in the circumstances. It is, of course, clear that some activities are more dangerous than others; but the test concerning the question of liability is always the same, namely, whether there has been negligence. In order to determine that question it is necessary merely to consider what safeguards would have been taken, in the circumstances, by a reasonable man though it is to be presumed that, in the case of dangerous or technical operations the safeguards must be such as would be taken by an expert: in other words the reasonable man must be or employ an expert. Their Lordships have, however, negatived the view that the carrying on of certain dangerous trades, businesses or other operations is to be equated with the keeping of dangerous animals, which a man keeps at his peril in the sense that he is liable in respect of any injury or damage which they may cause, regardless of the question whether he has been negligent. Lord Macmillan goes further, and expresses the opinion that although premises may be used for a purpose which is admittedly dangerous:

> "Persons injured by the explosion inside or outside the premises would alike require to aver and prove negligence to render the defendants liable" (*c*).

It will, however, be observed that the reference here is to personal injuries. To say that a neighbouring owner or occupier whose *land* is damaged by a hazardous operation on adjacent land must aver and prove negligence would be to deny both the law of nuisance and the rule in *Rylands* v. *Fletcher*. This does not necessarily mean that proof that there was no negligence would not constitute a valid defence. It is clear that in *Rylands* v. *Fletcher* there had been negligence on the part of the defendant's contractors. Is there any ground for saying that the defendant in that case would not have escaped liability if it had been proved that the defendant's contractors had not been negligent? If act of God or of third party is a defence,

(*b*) Damage by escape into the air is obviously possible nowadays, and escape upwards or downwards to the detriment of horizontal hereditaments is also possible.

(*c*) *Per* Lord Macmillan in *Read* v. *J. Lyons & Co., Ltd.*, [1946] 2 A. E. R. at p. 476.

inevitable accident might well have been added to the list of exceptions; but as Blackburn, J., observed, the defendant could "excuse himself by showing that the escape was owing to the plaintiff's default or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but *as nothing of this sort exists here, it is unnecessary to enquire what excuse would be sufficient*". (The italics are mine.) As the question whether *Rylands* v. *Fletcher* extends to cases of personal injury is dealt with under a separate heading in this article, I do not pursue that point here, but confine myself, so far as possible, to the question of liability in relation to dangerous activities. However, some of the decisions in connection with dangerous activities relate to cases of personal injury, and neither the fact that their Lordships did not refer to them in *Read's Case*, nor the fact that they are unsatisfactory and appear to rest upon no logical basis renders them less material.

Thus, in *Bower* v. *Peate* (1876), 1 Q. B. D., at p. 326, Cockburn, C.J., posed a case in which certain work had been ordered and was of such a nature that injurious consequences to a neighbour must be expected to result from that work unless precautions were taken. His Lordship stated that the person ordering such work—

> "is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful".

It would seem that the proposition thus enunciated by Cockburn, C.J., is so wide as to apply to almost every building work or other operation involving manual or mechanical labour. A less sweeping rule was substituted by Lord Blackburn in *Dalton* v. *Angus* (1881), L. R. 6 App. Cas. 740, 829:

> "Ever since *Quarman* v. *Burnett* (1840), 6 M. & W. 499, it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done *the doing of which casts on him a duty*, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor".

Lindley, L.J., said in *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335, that Lord Blackburn in the above passage "contrasts a contractor's negligence, which he calls 'collateral', with failure on the part of a contractor to perform the duty of his employer. For the first the employer is not liable; for the second he is, *whether the failure is attributable to negligence or not*". The concluding words, which I have italicised, were not, however, employed by Lord Blackburn. They may, in fact, be misleading: for if the duty of the employer is not an absolute duty to avoid all harm but only to take all reasonable care to avoid harm, then the words "whether the failure is attributable to negligence or not" incorrectly suggest that the employer will be liable

whether the contractor is guilty of negligence or not. Now although there may be cases in which nothing short of act of God or King's enemies or of a third party may exempt the employer from liability, there are also certain cases in which the employer, though vicariously responsible for the acts of his independent contractor, is liable only if negligence is proved. Thus, in *Hughes* v. *Percival* (1883), 8 App. Cas., at p. 446, Lord Blackburn expressed the view that the employer's duty concerning the support of an adjoining wall was not to provide (*i.e.*, to ensure absolutely) that no damage *should* come to it, but only to see that reasonable skill and care were exercised in operations on the neighbouring land.

The true rule appears to be that there are certain cases in which A cannot escape liability to his neighbour by showing that the contractor employed by him has not performed A's duty, though A will not be liable in respect of the collateral negligence of his employee. It is possible to give a number of examples of the application of this rule (*b*); but it is impossible to rest it upon any settled legal principle. Something may be said for the proposition that a person or body having a duty which is imposed upon that person or body by statute or common law delegates the performance of that duty at his peril. It must, however, be understood that such a proposition is true only in cases where the duty in question imposes absolute liability upon that person or body. As Salmond pointed out many years ago, it would be very imprudent of a person who is carrying out a dangerous but technical operation to neglect to employ technicians to perform the work. Nevertheless it is clear that in some cases the employer will be liable for any damage or injury which results from the operation, even though the contractor has not been negligent. Thus, if a statute imposes upon a person or corporation an obligation to provide certain safeguards and the statute is so worded that the duty is absolute, the fact that an independent contractor is employed to perform that duty will not excuse the person or corporation who was required to provide those safeguards. Again, no proof of negligence is necessary if the act which is done amounts to a nuisance in law; and liability in respect of the continuance (*c*) of a nuisance (except a nuisance arising from the activities of nature upon land which has been left in its natural state), is independent of negligence. Indeed, that liability is substantially absolute. The fact that the nuisance was caused by act of God or by a third party will not relieve from liability a person on whose land a nuisance exists, if with knowledge or means of knowledge he has failed to remedy the nuisance within a reasonable time: *Sedleigh-Denfield* v. *St. Joseph's Missions*, [1940] 3 A. E. R. 349. Even in the case of "natural" nuisances, liability has been imposed by statute in respect of certain of such nuisances (*e.g.*, failure to prevent the growing of certain noxious weeds).

However, the doctrine of *Rylands* v. *Fletcher* does not appear to

(*b*) *E.g.*, *Bower* v. *Peate* (1876), 1 Q. B. D. 321; *Hughes* v. *Percival* (1883), 8 App. Cas. 443; *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335; *Black* v. *Christchurch Finance Co.*, [1894] A. C. 48; *Gray* v. *Pullen* (1864), 5 B. & S. 970; *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314. Danger to the public is the keynote in this class of case.

(*c*) Continuance here means the failure to abate the nuisance notwithstanding the expiry of a sufficient period in which it might reasonably have been abated.

rest upon nuisance, despite the fact that many textbook writers have found it convenient to deal with that decision under that heading. The degree of "peril" which is comprehended in the statement in *Rylands* v. *Fletcher* concerning things which a man "must keep in at his peril" may perhaps vary according to the nature of the "thing". For example, it is not altogether clear that a person who chooses to keep wild animals is not liable if they escape owing to an act of God. Moreover, it is plain that the absence of negligence is no excuse. Indeed, that is so in the case of an animal which is not *feræ naturæ*, once the owner is aware that it has a ferocious disposition, *Card* v. *Case* (1848), 5 C. B., at p. 633. Again, there would not appear to be any ground for suggesting that the liability of the owner of wild animals or of ferocious dogs, is confined to cases in which they escape from the defendant's premises. It has been said that as to such animals the duty of the owner is not merely to keep them *in* at his peril. It is more correct to say that he *keeps* them at his peril : see *per* Lord Simonds, *Read* v. *J. Lyons & Co., Ltd., supra*, at p. 482.

Thus the keeping of a menagerie may entail a higher degree of liability than that which rests upon a manufacturer of explosives :—

(1) The keeper of a menagerie may be liable in respect of personal injuries (as well as damage to property) without proof of negligence.

(2) He may be so liable although there has been no escape from his premises.

If the keeping of wild animals falls within the category of dangerous operations it may, therefore, be said that they form an exception from the general proposition which appeared to commend itself to the House of Lords in *Read's Case, supra*, namely that it is not the law of England that—

> "Some operations are so intrinsically dangerous that no degree of care, however scrupulous, can prevent the occurrence of accidents, and that those who choose for their own ends to carry on such operations ought to be held to do so at their peril".

There may be other exceptions to that rule, but the general rule is now established that there is no "absolute" liability in respect of "ultra hazardous" trades though a higher degree of care may be incumbent upon persons who conduct such trades.

Personal Injury.

Lords Macmillan and Uthwatt were clearly of opinion that the rule in *Rylands* v. *Fletcher* did not apply to cases in which the wrong complained of was a personal injury. The Lord Chancellor, and Lords Porter and Simonds, however, preferred to leave open that question.

It has been assumed upon more than one occasion that the doctrine of *Rylands* v. *Fletcher* does extend to cases of personal injury. Two modern instances may be cited. In *Miles* v. *Forest Rock Granite Co. (Leicestershire), Ltd.* (1918), 34 L. T. 500, the Court of Appeal held that where a quarry owner brings to his own land explosives which he uses on that land, he is liable in respect of personal injury sustained by a person who is in the vicinity of the quarry and is hurt by a stone

dislodged by blasting operations conducted by the quarry owner; and that such liabilty is independent of negligence. The main judgment was delivered by Swinfen Eady, M.R., who referred to *Rylands* v. *Fletcher*, and clearly entertained no doubt that where a person collected on his own land something likely to cause personal injury if it escaped the rule applied, and that the case was like that of the dangerous and mischievous thing. Neither Lord Justice Scrutton nor Lord Justice Duke would appear to have doubted that the rule in *Rylands* v. *Fletcher* was applicable.

In *Shiffman* v. *Order of St. John of Jerusalem*, [1936] 1 A. E. R. 557, an insecure flagpole had caused an injury to the plaintiff. The defendants were held liable upon the ground that they had been negligent; but Atkinson, J., said that he could not see why the case was not within the rule in *Rylands* v. *Fletcher*, and that that rule was not limited to the use of the defendants' land, but was applicable as between licensees.

However, the view that the doctrine of *Rylands* v. *Fletcher* applies to personal injuries has received a rude shock. If the highest tribunal does decide that the doctrine applies only to damage to land there will be a further ground for suggesting that *Rylands* v. *Fletcher* is grounded upon nuisance. The difficulty will remain that the defences available in respect of nuisance are not all available in cases falling within the rule in *Rylands* v. *Fletcher*, so long as inevitable accident (as distinct from act of God) and acts or omissions of an independent contractor are considered to be no defence to an action based on *Rylands* v. *Fletcher*. The fact is that it is very difficult to find any logical ground for the rule in *Rylands* v. *Fletcher* because no reason can be found for admitting act of God, King's enemies and the act of a third party as defences whilst denying that inevitable accident (other than act of God) is a defence to an action based on that rule. Moreover, the act or omission of an independent contractor is, in one sense, the act of a third party, for the employer has no control over the contractor, and he would, in many cases, be actually foolish, and would therefore be rightly held to be negligent, to attempt to interfere with or direct the execution of any technical work either in whole or in part unless he was himself expert in such work. Nor is it to be forgotten that if the employer engaged a fully competent architect to supervise the work of the independent contractor he would gain no immunity from liability in an action founded on the rule in *Rylands* v. *Fletcher*.

Many years have passed since Scrutton, L.J., remarked that very little of the rule remained. It would appear from at least one judgment in which he concurred that it had not occurred to him to doubt that the rule extended to personal injuries: see *Miles* v. *Forest Rock, etc., Ltd., supra*. The opinions in the *Read* v. *Lyons Case* show a tendency not merely to eliminate cases of personal injury, but to narrow down "unnatural user", a topic which deserves a separate heading.

Unnatural User.

The term "non-natural user" which is so often used in connection with the rule in *Rylands* v. *Fletcher*, appears to suggest some

user which is abnormal; but there is in truth little justification for such an interpretation of that term as employed in *Rylands* v. *Fletcher*. The distinction which was taken in that case was between things which were "naturally" upon the land or conditions "naturally" subsisting in connection with the land, and things or conditions which were brought about by the act of man. Thus Blackburn, J., observed that "the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril". Elsewhere in his judgment he observes that:

> "there is no difference in this respect between chlorine and water; both will if they escape, do damage, the one by scorching and the other by drowning, and he who brings them there must at his peril see that they do not escape and do that mischief".

Apart from a few things such as soap bubbles, almost everything may "do mischief" if it escapes; and therefore, "anything likely to do mischief if it escapes" applies to practically everything which is brought on land.

In short the occupier of land must, according to the *dicta* in *Rylands* v. *Fletcher*, so use the land he occupies that he does not damnify his neighbour: "He whose stuff it is must keep it that it may not trespass". As Mellish, L.J., said in the later case of *Nichols* v. *Marsland* (1876), 2 Ex. D. 1, in which act of God was admitted to be an excuse, "the wrongful act is not the making or keeping the reservoir but the allowing or causing the water to escape".

However, that interpretation of the doctrine merely emphasises the fact that the term "non-natural" or "unnatural" user is not intended to imply anything blameworthy, and gives no clue to the question "what kinds of user have in fact been held to be non-natural". The difficulty of furnishing any satisfactory reason for distinguishing between a reservoir and a dwelling-house or other usual building on land has not passed entirely unnoticed; but decisions can be cited which furnish authority for the proposition (justified or unjustified) that the erection of a house is not to be regarded as a "non-natural" user, and that mining or quarrying operations are "non-natural" for the purposes of the rule in *Rylands* v. *Fletcher*. Thus, in *Pontardawe Rural Council* v. *Moore-Gwyn*, [1929] 1 Ch. 656, it was said where the owner of land on which there was an outcrop of over-hanging rock had used his land in an ordinary way *without any mining or quarrying operations* he was not liable for damage caused by the weathering and falling of portions of rock; and compare with that decision *Bartlett* v. *Tottenham*, [1932] 1 Ch. 114, where non-liability for damage by water to the plaintiff's land was established upon the ground (*inter alia*) that there the defendant had not erected any structure causing rain water to pass to the defendant's land. As to the erection of a house being a natural user not within the rule in *Rylands* v. *Fletcher*, it is sufficient to cite the case of *Wilkins* v. *Leighton*, [1932] 2 Ch. 106, which is an express authority for that proposition, and for the further (doubtful) proposition that it is a defence to a claim in nuisance, that there is no evidence that the defendant knew, or could have known, that the house constituted a

nuisance or hidden danger to the plaintiff's property (*d*). If the claim were for damages in respect of the continuance of a nuisance as distinct from causing it, that proposition could be supported more readily.

However, once non-natural user has been established, it is no answer to a claim in respect of damage to the property of a neighbour that the defendant did not know, and could not have known, by reasonable diligence that it was probable—or even possible—that the damage might occur. In *Wing* v. *L. G. O. Co.*, [1909] 2 K. B. 652, Fletcher Moulton described the rule in *Rylands* v. *Fletcher* as applicable "where by excessive use of some private right a person has exposed his neighbour's property *or person* to danger". Ignoring the italicised words, we have the conception of "excessive" use in substitution for "non-natural" use. That change sheds no light on the types of user which are to be treated as falling within the rule. The Courts have found means of side tracking that question in relation to cases where installations in buildings used in common by the occupiers of those buildings have caused damage (either on that ground or on the ground of consent), and also where a tenant of the lower portion of a building held a lease from a landlord who occupied the upper portion, and whose sprinkler installation there caused damage to the tenant's stock. In the latter case it was laid down that the tenant having taken the demised premises as they were, had impliedly consented to the presence of the sprinklers in the upper portion with the result that *Rylands* v. *Fletcher* did not apply: *Peters* v. *Prince of Wales Theatre* (*Birmingham*), *Ltd.*, [1943] K. B. 73.

It is fair to say that if a landowner or an occupier of land makes use of his land by putting upon it a reservoir his neighbour cannot be deemed to have consented, if he does not protest, for he would have no power to enforce his protest; but *Peters' Case*, *supra*, is cited first, because it shows that the rule in *Rylands* v. *Fletcher* does not automatically apply in respect of all damage which results from a user which the Court is prepared to accept as an example of "non-natural" user, and secondly, because it is an example of the manner in which the Courts have been acute to find means of negativing the application of the rule. The fact that I agree that my neighbour (landlord or otherwise) may carry on a business which is both noisy and dangerous, or that he shall keep on his land a steamroller does not necessarily prove that I am willing to forego my rights, if, owing to the escape of my neighbour's products or of his steamroller, damage is caused to my land. It is submitted that the true explanation of the "consent" cases is that, the rule, in so far as it imposes liability regardless of

(*d*) It may occur to the reader that the *dicta* in the decision of the Court of Appeal in *Wringe* v. *Cohen*, [1939] 4 A. E. R. 241, appear to warrant the view that the question whether the defendant knew or ought to have known that his premises were in a dangerous condition did not affect his liability, but it will be found that apart from those *dicta* the judgment of the Court (delivered by Atkinson, J.) also contains the statement that an occupier or owner is not responsible for a nuisance created not by [mere] want of repair, but by a secret and unobservable operation of nature, such as subsidence, unless with knowledge or means of knowledge he allows the danger to continue. That may be a sufficient explanation of the decision in *Wilkins* v. *Leighton*, *supra*, but if it is not, little light can be shed on this question. Counsel for the defendant in the *Wringe Case* cited *Wilkins* v. *Leighton*, but although Atkinson, J., referred to a substantial number of other decisions he did not offer any comments upon the last-mentioned case.

negligence, is unreasonable, and that the Courts have endeavoured to discover reasons for refusing to extend its ambit. In the case of *Read* v. *Lyons*, it was not necessary for the House of Lords to touch upon the question of non-natural user because their unanimous opinion was that as there had been no escape the rule did not apply. However, the profession is fortunate enough to have the benefit of some observations of their Lordships on that question. Before proceeding to touch upon those views it may be worth while to point out that in *Rainham Chemical Works, Ltd.* v. *Belvedere Fish Guano Co.*, [1921] 2 A. C. 465, the House was clearly of the opinion that the making of munitions was not the natural use of land, and that it was a use of the kind referred to in *Rylands* v. *Fletcher* as a non-natural use. Lord Buckmaster was emphatic upon that point, stating that such a case was "certainly not the common and ordinary use of the land" (at p. 471). That *dictum* may be contrasted with the remark of Lord Moulton in *Rickards* v. *Lothian*, [1913] A. C. 263, that to bring the rule into play, the use must be one which brings "increased danger to others".

However, the Lord Chancellor in the course of his opinion in *Read* v. *Lyons* said, "I think it not improper to put on record, with all due regard to the admission and *dicta* in that case" [the *Rainham Case*] "that if the question had hereafter to be decided whether the making of munitions in a factory at the government's request in time of war . . . is a 'non-natural' use of land, adopted by the occupier 'for his own purposes' it would not seem to me that the House would be bound by this authority to say that it was". Lord Uthwatt agreed. Lord Macmillan was disposed to agree, but expressed no final opinion. Lord Porter observed that what may be regarded as dangerous may vary according to the circumstances. Lord Simonds' approach to the problem of *Rylands* v. *Fletcher* was narrower, and his views on this point are not revealed by his opinion. He agreed with Lord Macmillan's view that there is no rule imposing on a man who carries on an ultra hazardous business a strict liability to those who are lawfully *on the premises*. On the whole, however, it seems clear that in *Read* v. *Lyons*, the majority view was that, at any rate in wartime, the making of munitions was not a user of the land which would bring into operation the rule in *Rylands* v. *Fletcher*. Two comments may be made in this connection :—

(1) The above *dictum* appears to suggest that a distinction is taken between the doing by an occupier of an act "at the Government's request" and the doing of a similar act by the same person "for his own purposes" without such a request. It is difficult to understand why the application of the rule should depend upon the motive or whether the act was done for a third party. The test is whether the user was "natural" or "non-natural"; not "Why was it embarked upon?" It may, of course, be conceded that the classes of "natural user" are not necessarily closed, though it would be easier to understand the ambit of the rule in *Rylands* v. *Fletcher* if they could be defined intelligibly.

(2) It is not clear whether any distinction is to be taken between the placing upon land of some static object of a dangerous

nature, (or containing something which is likely to do harm if it escapes), and the active conduct of a dangerous trade.

(3) It cannot be denied that the decision in *Rylands* v. *Fletcher* involves the principle that a man may be responsible, although not personally negligent, if he constructs on his land a reservoir from which water escapes and injures the land or buildings of his neighbour unless he can show that the escape was due to the act of God or of a third party.

Now the basis of liability in case (3) is the proposition that the erection of a large reservoir is a non-natural use. As we have seen the Courts have refused to apply the rule to houses, because the erection of a house is not regarded as a "non-natural" user for the purpose of the rule in *Rylands* v. *Fletcher*. We are therefore left with the rather startling indication by the majority of the noble Lords whose opinions were expressed in *Read* v. *Lyons*, that although the erection (or existence) upon land of a reservoir is a non-natural user, it is not to be assumed that the same can be said of the manufacture upon land of munitions of war, at any rate in wartime. It was already difficult for the practitioner or the student to reconcile *Rylands* v. *Fletcher* with the general principles of the law of tort; but if the proposition enounced in the last sentence is correct, I feel that the only comment which I can make is that: "I may not understand; but I am willing to admire".

Escape.

The main ground upon which the decision of the House of Lords in *Read* v. *Lyons* was based was that the dangerous thing had not escaped from the land of the defendant. Their Lordships were unanimously of the opinion that the rule in *Rylands* v. *Fletcher* did not apply unless there had been an escape.

The Rule Restated.

I now embark upon the extremely "hazardous operation" of restating the rule in *Rylands* v. *Fletcher*. Perhaps that rule may now be stated with an approximation to accuracy, but with considerable ambiguity, as follows:—

If a person either erects or places any erection or other thing upon his land (*e*), or conducts any activity upon his land, and in so doing is making a non-natural use (*f*) of that land, he will be liable for any damage caused to neighbouring land (*g*) by the

(*e*) In order to present a short statement of the rule it has been necessary to indulge in some over-simplifications, of which the term "his land" is an example. It is clear that the rule will apply whether there is ownership or occupation, or even the mere use of land by virtue of a franchise; or, *semble*, a licence not creating an interest in land.

(*f*) If any critic suggests that this statement of the rule is of little practical value so long as it is impossible to determine what is meant by "non-natural use", my reply is that I cannot agree more.

(*g*) "Land" is intended to include buildings thereon. It seems unlikely that the rule will be applied to cases of personal injury (as it has in the past), but that point is not finally decided.

escape of the thing so erected or placed or of any part of it, or by the escape of anything in consequence of that activity unless he can show :—

(i) that such escape was caused by an act of God (*h*), or by a third party (*i*), or by the act or default (*k*) of the plaintiff, or

(ii) that the plaintiff had expressly or impliedly consented (*l*) to the erection or placing of the thing upon the defendant's land (*m*), or to the conduct of the activity in question (*n*), and that the escape occurred without any negligence on the part of the defendant, or

(iii) that the defendant was authorised by statute (*o*) to erect or place the thing upon his land where it was in fact erected or placed, or to conduct the activity in question where it was conducted upon that land and that the escape occurred without any negligence on the part of the defendant.

The above statement ignores three points :—

(a) *The nature of the interest which the plaintiff must have in the neighbouring land.*

It will be appreciated that apart from the opinion

(*h*) Or *semble* King's enemies. Here the term " act of God " means a disaster caused by activities of the elements of such an abnormal nature that the resultant damage could not have been averted by any precautions which a reasonable man might have been expected to take in the circumstances. It is undoubtedly an example of " inevitable accident "; but that term cannot be substituted in a statement of the rule in *Rylands* v. *Fletcher* because the admission of " inevitable accident " generally as a defence would be equivalent to the abolition of the rule itself: for Blackburn, J., declared that it was unnecessary to consider the issue of negligence, and in order to determine whether an occurrence was inevitable it would be necessary to consider whether the defendant had been negligent.

(*i*) See *Box* v. *Jubb* (1879), 4 Ex. D. 76.

(*k*) Cf. *per* Lord Cairns in *Rylands* v. *Fletcher* (1868), L. R. 3 H. L. 330, repeating and approving the words of Blackburn, J., in the Court below (L. R. 1 Ex. 265), which are confined to " the plaintiff's default "; but it is submitted that the term default was clearly intended to include a positive act. The doubtful question is " Why did Blackburn, J., refer to default? " What duty rests upon an adjoining owner to prevent or even to give warning of the probability of an escape?

(*l*) *Att.-Gen.* v. *Cory Bros. & Co., Ltd.*, [1921] A. C. at p. 539. Cases in which the act complained of was for the mutual benefit of the plaintiff and the defendant and with the implied consent of the plaintiff are, for example, *Carstairs* v. *Taylor* (1871), L. R. 6 Ex. 217, and *Ross* v. *Fedden* (1872), L. R. 7 Q. B. 661; and see *Rickards* v. *Lothian*, [1913] A. C. 263.

(*m*) It is to be assumed that the thing was not erected or placed on a part of the land to which the consent could not be deemed to extend.

(*n*) See the last footnote: the same point arises as to the part of the land on which the activity is conducted.

(*o*) *Green* v. *Chelsea Waterworks Co.* (1894), 70 L. T. 547. The question whether the particular act or activity is authorised must always be a matter of construction as applied not merely to the words but also to the facts. If the statute is merely permissive and the authority can be exercised without committing a nuisance, it must not be exercised in such a manner as to create a nuisance: *Managers of Metropolitan Asylums District* v. *Hill* (1881), L. R. 6 App. Cas. 193. And it is important to note the statement of Lord Blackburn in that case that if the Legislature does not provide for compensation to those who may be injured by the exercise of the power conferred by the statute, that affords a reason, though not a conclusive one, that the act is authorised only if it can be done without injury: cf. *C. P. Ry.* v. *Parke*, [1899] A. C. 535. The power may, however, be imperative in the sense that it confers an absolute right to do the act. In that event a nuisance is justified provided that there is no negligence in the doing of the act, and the nuisance is not avoidable by precautions or alternative steps which might reasonably have been expected to be taken by those exercising the power: *Lagan Navigation Co.* v. *Lambeg Bleaching, etc., Co.*, [1927] A. C. 226; *Geddis* v. *Proprietors of Bann Reservoir* (1878), L. R. 3 App. Cas. 430.

of Lord Macmillan in *Read* v. *Lyons*, no question of the *necessity* of ownership or of occupation or use of land by the plaintiff had arisen in relation to claims based on *Rylands* v. *Fletcher*. Certainly Blackburn, J., referred in his judgment to the escape of something from one man's land to his neighbour's land in a portion of his judgment; but the cases in which *Rylands* v. *Fletcher* has been applied are not confined to actions by persons having an interest in neighbouring land. If Lord Macmillan is right in thinking that one of "the two prerequisites of the doctrine" is "that there must be the escape of something from one man's close to another man's close", then it is clear that no one can invoke the rule unless he has some interest in "a close", which will normally mean neighbouring land. It is impossible to foretell whether the view of Lord Macmillan will prevail; and it may be rash to hazard a conjecture as to the nature of the interest which the plaintiff must have in the neighbouring land. Presumably nothing less than a right of exclusive occupation would suffice; and it would seem probable that the cases touching the interest which must be shown by a plaintiff in nuisance would afford a useful guide: see, for example, *Malone* v. *Laskey*, [1907] 2 K. B. 141; *Metropolitan Properties, Ltd.* v. *Jones*, [1939] 2 A. E. R. 202. Whether a right of exclusive user granted by licence would be sufficient must be regarded as doubtful, but as such a right of user constitutes rateable occupation it is submitted that the interest of such a licensee would be sufficient to enable him to sue under the rule in *Rylands* v. *Fletcher* if Lord Macmillan's view prevails.

However, it must be emphasised that their Lordships have not definitely held that *Rylands* v. *Fletcher* is limited to cases of damage to land and buildings, and that in relation to damage to goods the judgment of Blackburn, J., clearly extended to such damage: and see his judgment in the subsequent case of *Cattle* v. *Stockton Waterworks Co.* (1875), L. R. 10 Q. B. 453, and the reference thereto by Viscount Simon, L.C., in *Read* v. *Lyons*, at p. 475. If Lord Macmillan's view that *Rylands* v. *Fletcher* applies only to damage to land prevails, it is clear that claims in respect of damage to goods are ruled out.

(b) *The question whether the rule extends to personal injuries.* As two only of their Lordships indicated any clear preference for the view that the rule does not apply to claims in respect of personal injury, and the remaining three preferred to leave that question open, it should not be assumed from the omission of any reference to personal injuries from the above restatement of the rule in *Rylands* v. *Fletcher* that such a claim, based on the rule in *Rylands* v. *Fletcher*, is necessarily doomed to failure, though that would appear to me to be probable. On the other hand, in view of the doubtfulness of such a claim if the cause of the injury can be traced to the negligence of an independent contractor,

there will possibly be a greater tendency on the part of plaintiff's counsel to resort to the doctrine in *Bower* v. *Peate* (1876), 1 Q. B. D. 321, and *Hughes* v. *Percival* (1883), 8 A. C. 443, and to seek to extend the classes of persons to whom a duty is owed and the types of operation to which that doctrine applies.

(c) *Inevitable accident as a defence.*

It is sufficient to observe that despite the numerous cases in which *Rylands* v. *Fletcher* has been invoked there would appear to be no case in which the Court has found it necessary to consider whether inevitable accident is a defence. The omission from the rule, as above restated, of any reference to inevitable accident is due to the fact that there is at present no authority for the view that inevitable accident (as distinct from act of God *stricto sensu*) is a defence. No one has advanced any cogent reason for holding a defendant liable for occurrences which a reasonable man would not guard against if they are caused by nature and holding him liable for such occurrences if they are caused by man. If such a distinction were sound it would no doubt be found in the law of nuisance and of negligence. The admission of inevitable accident as a defence would not amount to a denial of the validity of the decision in *Rylands* v. *Fletcher*. It would remain the law that in cases to which the rule applied liability would arise *without proof of negligence*, which is equally true in relation to nuisance or trespass, as may be seen from the books of pleadings. It would also remain the law that although the defence of " act of third party " would still be a defence, an independent contractor or servant employed by the defendant would not be a third party for that purpose. Perhaps the reason for the absence of any decision covering the question whether inevitable accident is a defence in *Rylands* v. *Fletcher* cases is that most accidents are due to act of God or of a third party unless there is negligence on the part of the defendant or his servant or contractor. There remains, however, the case in which the defendant was the sole actor. We have seen that in *Stanley* v. *Powell*, [1891] 1 Q. B. 86 inevitable accident was an answer in trespass to the person. It seems irrational if the position is that the defendant would have been liable if the firing of his gun had caused harm to a neighbouring house notwithstanding that the accident was inevitable, whilst that plea would have been quite effective if he had merely killed his neighbour. However, that does appear to be the state of the law if inevitable accident is an answer to an action for trespass, but not to an action grounded upon *Rylands* v. *Fletcher*.

RECOVERY OF MONEY MISTAKENLY PAID BY PERSONAL REPRESENTATIVES.

By J. G. Fleming, M.A.

Re Diplock, [1947] 1 A. E. R. 522, recalls the complexity of the legal situation caused by the wrongful payment of funds by trustees or personal representatives into the hands of third persons who are not entitled to them.

The testator, who died in 1936, by his will left his residue for such "charitable or benevolent" institutions as his executors might select. Between 1936 and 1938 the personal representatives distributed some £200,000 among 139 institutions, but in the following year the persons entitled under the A. E. A., 1925, challenged the validity of the residuary gift, and the executors took the precaution of sending warning letters to the recipients of the sums allocated under the will. As noted in 9 *Conveyancer* 85–6, the House of Lords, [1944] A. C. 341, declared the bequest void for uncertainty, and proceedings were instituted for the recovery of the sums. The following points emerge from the judgment of Wynn-Parry, J., which deserves the closest attention as a concise and unambiguous statement of the law on the question of recovery and tracing.

(1) The plaintiff's *personal* claim against the institutions on the basis of the common law action for money had and received by reason of the wrongful payment was rejected on the ground that it was induced by a mistake of law, not fact: *Kelly* v. *Solari* (1841), 9 M. & W. 54; *Holt* v. *Markham*, [1923] 1 K. B. 504.

The judgment represents a clear reiteration of the restricted scope of the quasi-contractual remedy as established in *Sinclair* v. *Brougham*, [1914] A. C. 398, and *Bayliss* v. *Bishop of London*, [1913] 1 Ch. 127 (see particularly the judgment of Hamilton, L.J., at p. 140) in preference to the more generous interpretation advocated by Lord Wright in *Brooks Wharf* v. *Goodman*, [1937] 1 K. B. 534, and 6 Camb. L. J. 305.

(2) There is no *personal* equity transcending the limits of the common law right so as to allow a person, entitled in equity to property which has been transferred to another who is not a purchaser for value without notice, to recover such property, even although it has been paid under a mistake of law. The wide proposition suggested by the plaintiff was emphatically rejected by the learned Judge, although a consideration of some of the authorities leads to the inescapable conclusion that this matter was, at any rate, not beyond doubt: see particularly *Harris* v. *Harris II* (1861), 29 Beav. 110; *Rogers* v. *Ingham* (1876), 3 Ch. D. 351; *Hilliard* v. *Fulford* (1876), 4 Ch. D. 389; *Re Rivers*, [1920] 1 Ch. 320.

(3) The exact line of demarcation between fact and law remains undefined, beyond the rule that mistake relating to the effect of the general law of England or construction falls into the latter category. It is thought regrettable that so little guidance is to be found on a point which has proved to be of paramount importance. Thus, in *Re Robinson*, [1911] 1 Ch. 502, ignorance of the rule that statutory entails are incapable of being barred was treated as a mistake of fact,

and the plaintiff would have succeeded in recovering the sums on analogy to the common law action for money had and received but for the fact that the Court held the action barred for lapse of time on analogy to the Statute of Limitation. (It is thought that this situation is now directly covered by section 19 (2), Limitations Act, 1939.)

(4) It is not clear whether Wynn-Parry, J., intended to cast doubt on the proposition that in the case of " continuing trusts " mistakes of law as well as of fact can be rectified by a readjustment of future payments due to the overpaid beneficiary : see *Re Ainsworth*, [1915] 2 Ch. 96, *Re Reading*, [1916] W. N. 262, and *Re Musgrave*, [1916] 2 Ch. 471. These decisions were not quoted in the judgment, but it is noteworthy that the learned Judge did rely on *Re Hatch*, [1919] 1 Ch. 351, where Sargant, J., refused to follow the previous line of authority on the apparent ground that the distinction was material in cases of " continuing trusts " under a covenant, and held that there could be no readjustment of accounts in consequence of a wrongful payment caused by a mistake of law (cf. *Underhill*, p. 552, *Lewin*, pp. 270–1).

For the sake of completeness, it is worth recalling that where the trustee is also a beneficiary, an overpayment in favour of another *cestui que trust* cannot apparently be rectified in any circumstances : *Re Horne*, [1905] 1 Ch. 76, though this is otherwise where the trustee/beneficiary has overpaid himself : *Re Reading, supra.* As explained by Joyce, J., in *Re Ainsworth*, at pp. 104–5, *Re Horne* is the remnant of the one-time Draconian view towards trustees.

(5) The present position may therefore be summarised as follows : " So far as a mere money demand is concerned . . . where the executor or administrator has paid money or transferred property, part of the estate of the deceased, to a person not entitled thereto in circumstances as not to make the recipient an express trustee, the only remedy open to the legatee or next-of-kin rightfully entitled against the recipient is either to pursue a common law action for money had and received in the name of the executor or administrator or to pursue in equity a claim analogous to the common law action for money had and received in which it would be unnecessary to join the executor or administrator as plaintiff. In either case, however, . . . it would be essential to demonstrate that the money has been paid under a mistake of fact and not a mistake of law " : *per* Wynn-Parry, J., at p. 533.

(6) Failure in the personal action against the institutions, however, does not prejudice the independent *proprietary* remedy of following the funds into the hands of the recipients. Tracing may proceed on the common law principle of *Taylor* v. *Plumer* (1815), 3 M. & S. 562, or the equitable principle of *Re Hallet's E.* (1880), 13 Ch. D. 696.

The former does not necessitate the existence of a fiduciary relationship between the recipient and the owner and allows the following of assets, notwithstanding any change in form, provided the means of identification continue to exist. Its scope is limited by the fact that money, unless retained " in a bag ", is not normally capable of identification. On the basis of Lord Ellenborough's judgment in *Taylor* v. *Plumer*, it used to be the considered opinion that as soon as money has been paid into a bank, the debtor-creditor relationship

supervened and substituted a chose in action for the specific assets in the shape of money : cf. Lord Haldane in *Sinclair* v. *Brougham*, [1914] A. C. 398, 419. This, however, was challenged by the Court of Appeal in *Banque Belge* v. *Hambrouck*, [1921] 1 K. B. 328 (particularly by Atkin, L.J., at p. 335), and rejected by Wynn-Parry, J., who laid down the principle that, provided money is not paid into a general account and thus mixed, the means of identification have not failed.

Thus, in so far as the institutions had paid the sums received into a special account, the plaintiffs could follow into the accounts and out of them into investments which had been purchased *wholly* with such moneys.

(7) On the other hand, in equity, wider possibilities of following trust moneys exist. As Atkin, L.J. ([1921] 1 K. B. 335), picturesquely phrased it : " If in 1815 the common law halted outside the banker's door, by 1879 equity had had the courage to lift the latch, walk in and examine the books ". Translated into terms of present-day practice, equity permits tracing even although money has been paid into a general account and there mixed with private funds belonging to the recipient, and further out of the account into specific investments : *Re Oatway*, [1903] 2 Ch. 356. Where, however, the account has been totally drawn upon and the money has been either literally dissipated or passed into the hands of *bona fide* purchasers without notice, recovery has become impossible : *Thompson* v. *Clydesdale Bank*, [1893] A. C. 398. Wynn-Parry, J., expressed the view that the same result would ensue where the moneys had been employed for the purpose of paying *unsecured* debts. The doctrine of subrogation developed in company law (but see *Re Wrexham*, [1899] 1 Ch. 440) cannot be called into aid here; *aliter*, where mortgages have been cleared off : *Trevillian* v. *Exeter Corpn.* (1854), 5 De G. M. & G. 828.

This equitable doctrine of tracing, however, is dependent on the existence of a fiduciary relationship. This is corroborated by the *method* of tracing, proceeding as it does on the assumption that a person in a fiduciary position may not allege that he has done wrongfully what he could have done rightfully. The relationship must exist at the time of receipt; the crucial period is not, as alleged by the plaintiffs, the time when the account is ultimately taken and a superfluity is found in the hands of the recipient.

Therefore, in so far as the institutions had paid the money into general accounts, prior to the receipt of the warning letter, the plaintiffs could not recover such sums, as at the time of paying in they were not clothed with a fiduciary character. Their conscience was, at that time, unaffected as they were totally unaware that the sums did not rightfully belong to them. On the other hand, where payments into general accounts occurred subsequently to the receipt of the warning letter, the equitable doctrine of tracing could be invoked and the plaintiffs could follow to the extent indicated above.

(8) It is thought appropriate to remind the reader of the more extensive remedies vouchsafed by the A. E. A., 1925, where dispositions have been assented to by personal representatives in favour of beneficiaries without making sufficient provision for the payment of *debts*. In these circumstances, tracing is guaranteed by sections 36 (9) and 38 (1). Moreover, the beneficiaries are *personally* liable for the value

of the interest received by them if they have disposed of it prior to action. This liability proceeds on the principle that on alienation the debts become the beneficiaries' to the extent of the value of the interest alienated by them: *Re Hedgeley* (1886), 34 Ch. D. 379.

NOTES OF RECENT CASES.

1. *LAW OF PROPERTY AND CONVEYANCING CASES.*

Estate agent's commission—sale never completed owing to vendor.—Giddys v. *Horsfall,* [1947] 1 A. E. R. 460, carries the law of estate agent's commission for uncompleted sales one stage further. Here the estate agents wrote to the defendant enclosing their terms of commission "in the event of our being instrumental in introducing a party prepared to purchase on the terms of your instructions or on terms acceptable to you". The copy of the terms did not mention commission in the event of the sale going off. The defendant did not write accepting the terms nor did she write quarrelling with them. The estate agents found a purchaser who actually signed "subject to contract", but the defendant backed out of the contract. Lewis, J., held that the agents were entitled to their commission as they had only contracted to find a prospective purchaser.

It is, of course, well known that ordinarily the sale must be completed in order that commission shall be earned: *Luxor* v. *Cooper,* [1941] A. C. 108 (noted *ante,* Vol. 5, p. 294), and this has been accepted as going a long way, as is instanced by *Jones* v. *Lowe,* [1945] K. B. 75 (noted *ante,* Vol. 9, p. 153). In this case, however, Lewis, J., was able to distinguish both these cases on the ground that the written letter was unambiguous in referring to the introduction of a purchaser and not to the sale. It is, however, to be noted that the learned Judge said that had the words stopped at "being instrumental in introducing a purchaser", a "purchaser" here would probably mean a person completing a sale, but the reference to being "prepared to purchase" put the matter beyond dispute.

It cannot be thought that the present position is satisfactory when the question of commission earned turns upon such a slight variation in terminology. It seems to be desirable that the estate agents should make clear whether it is desirable that commission should be paid on introduction of a willing purchaser and then draft a common form of words unambiguously expressing this contractual obligation.

Equitable assignment—delivery of policy with request to carry out onerous instructions—equitable charge.—Thomas v. *Harris,* [1947] 1 A. E. R. 444, is an interesting case on equitable assignments, because here a testator had before his death asked his son to bury him and put up a tombstone and pay for this out of certain policy moneys which he was directed to collect. This the son undertook to do in ignorance that the deceased had left a will. In fact the son carried out the instructions and then discovered that all the property was left to a third party. The Court of Appeal held that the direction constituted a binding contract which operated as an assignment of the policy of assurance by way of charge for the amount to be spent.

Informality is the hallmark of an equitable assignment, but it should

be noted that in the normal course the son would not have been bound legally to carry out his promise. It was the delivery up (through a stepdaughter) of the policy and the direction to pay himself out of the moneys when collected that constituted the binding obligation and charge upon the policy.

Building society mortgage—compound interest—liability of surety.—Eastern Counties Bldg. Socy. v. *Russell,* [1947] 1 A. E. R. 500, turned on the liability of a surety where £700 should remain owing on the security and it was argued that this sum could include any amount such as solicitors' costs, and was not limited to the amount due in repayment of the loan. This larger amount was partly arrived at by charging compound interest, and it was argued that this was not permitted by the mortgage. The surety's liability was to terminate " whenever the amount owing to the society in respect of the advance hereby made shall be reduced below the sum of £700 ". Hilbery, J., held that under the mortgage the society could not make up its accounts in such a way as to charge compound interest, and that " the amount . . . in respect of the advance " could only apply to payments in respect of the sum of £775 advanced by the society and did not include other payments under the deed. It should be noted that this construction was aided by the fact that elsewhere in the deed other provisions referred to " the amount owing to the society by virtue of this deed ".

Perhaps it is the first part of the judgment that is most important. Here " the society has added the interest on the loan at the end of each year. The total of loan, fines (if any) and interest has been brought forward to the next year's account, and, at the end of the next year, interest on the outstanding total, including the sum so brought forward, has again been calculated and added; and so on from year to year. The result has been that the mortgagor has been charged compound interest. . . . It is beyond question that there is no express agreement for compound interest to be found in the mortgage deed. It is too well established for it to be necessary to cite the authorities that a mortgagee cannot charge compound interest unless there is an agreement to that effect. . . . An agreement can, of course, be implied and here the plaintiff society urges the argument that building society accounts are always kept in this way, but, although this may be true and the building society may know when it enters into such a mortgage as this that it intends to keep the account in this way, there is no evidence before me that the mortgagor or surety knew it . . .".

The practice of building societies nowadays in drawing mortgages and the form adopted for showing repayments, etc., varies. Nevertheless, this view of the learned Judge must receive consideration. It is thought that the most satisfactory way in many respects is that of setting out the number of instalments of a specified amount which will discharge the mortgage and then to provide clauses for default of payment of instalments including, if desired, payment of interest on instalments in default.

(2 K. & E. 99.)

Vendor and purchaser—costs of suits—no lien on land where deposit to stakeholder.—Combe v. *Swaythling,* [1947] 1 A. E. R. 838, can be shortly noted, as a case where the purchaser claimed a lien for his costs in a specific performance action in which the deposit had been paid to a stakeholder. Wynn-Parry, J., held that in such a case no lien existed. The point is that on the old authorities the payment of the deposit to

the vendor created him a secured creditor for the repayment of the deposit if the sale went off. This was extended to cover the costs of a suit for specific performance. Where the deposit is paid to a stakeholder no such lien is created for the deposit, and, consequently, none for the costs.

Covenant in restraint of trade—doctor's "assistantship" agreement—ten miles for five years.—Routh v. *Jones,* [1947] 1 A. E. R. 758, lays down the principle that the onus of showing that a covenant is not void as contrary to public policy rests upon the person setting up the covenant, thus approving *dicta* in *Herbert Morris* v. *Saxelby,* [1916] 1 A. C. 706, and *Attwood* v. *Lamont,* [1920] 3 K. B. 587, and disapproving dictum of Birkenhead, L.C., in *Fitch* v. *Dewes,* [1921] 2 A. C. 158. The only ground on which a covenant in restraint of trade is valid is that special circumstances justify them and the party setting up such a contract must, therefore, justify it. In effect this means that the Court must be satisfied that it is reasonably necessary for the protection of the covenantee's trade.

In *Routh* v. *Jones* (*supra*) the covenant by a doctor was not to "practise in any department of medicine surgery or midwifery nor accept or fill any professional appointment". The Court held (affirming the decision at first instance noted *ante,* p. 216) that this covenant was wide enough to embrace practice as a consultant and other aspects of medical work, such as radiologist, and consequently that alone in the absence of severability would render it invalid. As was pointed out in the last note the decision emphasises the desirability of expressing the covenant sufficiently clearly as severable. But the decision of the Court of Appeal also indicates the importance of some examination of the exact circumstances before drafting the covenant at all. Although it is clear that the Court is less strict in construing covenants between vendor and purchaser than between master and servant, nevertheless in our experience there is a great tendency to draw the covenant too widely both in area and in the matters covered. To take an example, a smallish local shop does not *usually* draw its customers over a wide area, such as a radius of five miles, but in some cases it covers, for example in country districts, a much wider area. The draftsman should not usually take the directions of the covenantee without warning him of the danger of asking for too much. He must be able to *prove* that the protection was *reasonably necessary.*

(1 K. & E. 39, 42.)

Profit—creation by reservation or exception—licence and profit.—Re Vickers' Lease, [1947] 1 A. E. R. 195 (noted *ante,* p. 216), has been reversed in the Court of Appeal [1947] 1 A. E. R. 707. No authorities were cited by the Court and the decision, therefore, turned entirely upon the construction of the particular document and the nature of the right of fishing, which, according to Greene, M.R., "you would expect to find in some way limited or qualified by prescribing the particular conduct that a sportsmanlike person would be expected to observe in a river such as the Test". The lessee was, in fact, put under such stringent conditions, and it might, therefore, be regarded as the more likely that similar restrictions would be applied to a reservation intended to be alienable.

One point that does not seem to be discussed was that, if the right reserved to the lessor was only a licence, how the lessor could enforce the right against an assignee of the lease. It is true that there was a covenant not to assign without written consent, but this could not be unreasonably

withheld: Landlord and Tenant Act, 1927. The matter did not directly arise in the case, but it seems unreasonable at first blush to construe a document in such a way that the lessor's right reserved to her would not be enforceable if that would be the result. It is thought that the decision can be regarded primarily as a warning of the difficulty in dealing with this sort of case.

(1 K. & E. 1081.)

Escape of fire—Rylands v. *Fletcher—fire in a dwelling-house.—Sochacki* v. *Sas,* [1947] 1 A. E. R. 344, is a short judgment by the Lord Chief Justice concerning liability for a fire caused, apparently, by an ordinary domestic fire in a sitting-room. The lodger had left an ordinary fire in his grate while he was out of the room for two to three hours. Lord Goddard found as a fact that there was no evidence of negligence, that the doctrine of *res ipsa loquitur* did not apply in such a case so as to impute negligence, and that the rule in *Rylands* v. *Fletcher* did not apply. It is, however, not quite clear whether the learned Lord Chief Justice was more influenced by the fact that the claim was made by the landlords of the lodger who could not be heard to say that the fire was not authorised by them or by the fact that the lodger was "using his room in the ordinary natural way in which the room could be used". It seems that the latter view had most influence: he said (at p. 345): "If a person living in a house does no more than light a fire in a fireplace, and through some unhappy accident a fire occurs, he is certainly not liable under *Rylands* v. *Fletcher,* a very hard-worked case, which the House of Lords said recently should not be extended".

One other observation of the learned Lord Chief Justice is worth noting (at p. 345): "If I happen to be on somebody else's land at a time when a fire spreads to that land and my motor car is destroyed I have just as much right against the person who improperly allows the fire to escape as the owner of the land on which I happen to be". It is submitted that this statement does not imply that I need be an occupier of the land. It is, however, to be noted that this does not include personal injury about which the House of Lords left the question open in *Read* v. *Lyons,* [1946] 2 A. E. R. 471, the case to which reference is made in the above quotation.

We think that more is likely to be heard concerning the ambit of *Rylands* v. *Fletcher.* The present trend of authority is not only in the direction of limiting its application to escape from land but also in the character of the user which is to be deemed "unnatural". It has been a common notion that certain things of themselves constitute "unnatural user" and fire fell into that category. It now seems possible that this will cease to apply and that more must be shown. At the same time we feel some difficulty in seeing why collecting water in a reservoir is a less natural user than collecting fire in a fireplace. If water is to be supplied, and we hear much of this necessity, it seems to be as much a normal user of land as having a fireplace for heating.

It should, however, be pointed out that Professor Winfield (*Textbook on Tort,* 3rd ed., pp. 484–489) has questioned how far the rule in *Rylands* v. *Fletcher* applies to fire and, furthermore, under the Fires Prevention (Metropolis) Act, 1774, no action is maintainable against anyone on whose building or estate a fire shall accidentally begin and this has been held to exonerate a person whose fire has not originated or spread without negligence. Outside the Act Professor Winfield expresses doubt how far the rule in *Rylands* v. *Fletcher* applies. This aspect of the matter does not seem to have been discussed in the present case and the learned author points out that the rule has been deemed to apply in a number of cases.

Building Materials and Housing Act, 1945—locality of "sale".—In *R.* v. *Edwards,* [1947] 1 A. E. R. 314, a Divisional Court held that the locality of sale of registered land, completion of the title to which takes place in the Land Registry, is not necessarily at the Land Registry and the Justices of the place where the contract of sale was signed and completion took place had jurisdiction to hear a summons for an offence under the Act in selling the house above the controlled price. The point is that the Act does not mean "transfer of title" but the actual transaction of sale or agreement for sale. The Court did not indicate where the locality would be if the contract was signed in one place and the completion occurred in another.

Town and country planning—refusal to allow construction—re-development order—manner of exercising a discretion.—In *R.* v. *East Kesteven R. D. C.,* [1947] 1 A. E. R. 310, a Divisional Court dismissed an application for *certiorari* or *mandamus* to quash a refusal for permission to develop agricultural land by building a sports stadium. The reason given by the Minister was that "he felt obliged to pay particular regard to the overriding need to preserve for agricultural use any land which can be so used and is not required for essential development, even though its quality may not be high". The Lord Chief Justice, Lord Goddard, said (at p. 311): "In considering to what use the land within their district is to be put the planning authority must be entitled to consider whether certain land should be kept and used as agricultural land, I cannot see that it is any objection that there is in existence another Minister, namely the Minister of Agriculture, who can, if he chooses, give directions as to the cultivation of any land in the Kingdom . . .".

There is, perhaps, not much principle behind this decision except to indicate that the Courts must have regard to the fact that primarily the matter of planning is a question of administrative discretion with which the Courts will not interfere. It seems very difficult, if not impossible, indeed for the Courts to interfere as long as the discretion is based upon proper consideration. This goes not to the reasons for granting or withholding an order, but to the consideration of objections or applications.

This last point is illustrated by the decision in *Phœnix Assurance Co.* v. *Minister of Town and Country Planning,* [1947] 1 A. E. R. 454. Under the Town and Country Planning Act, 1944, the Minister can make a compulsory purchase order in respect of war-damaged areas provided he is "satisfied that it is requisite" for dealing satisfactorily with the area. In this case the applicants owned a building which in fact was not damaged though the area was. The planning authority desired to acquire the whole area for planning and by compulsory acquisition cheaply, but not to use the undamaged building for any other purpose. It was argued on behalf of the Minister that the Court could not inquire whether the Minister had "reasonable grounds". This argument was supported by reference to the decision in *Liversidge* v. *Anderson,* [1942] A. C. 206. Henn Collins, J., rejected this contention on the ground that the circumstances conferring an administrative discretion to imprison in time of war for the security of the realm did not apply to compulsory acquisition in time of peace. The section required the Minister to be satisfied on reasonable grounds that the requirements of the section had been met. The learned Judge then went on to hold that on the evidence before him the Minister had not in fact had reasonable grounds on which to base his opinion in favour of the compulsory purchase order and therefore it was to be quashed so far as it related to the property of the applicant.

Town planning—discretion of Minister to decide locality of new town. —The decision of the Court of Appeal in *Franklin* v. *Minister of Town and Country Planning,* [1947] 1 A. E. R. 612, indicates the difficulty of opposing a discretion of the Minister. The Court overruled the decision of the Court of first instance on the ground that there was no evidence of bias and in the absence of proof of bias it seems very hard to raise any objection. At the public inquiry the Court held that there is no need for the Minister to provide evidence of his case because his only obligation is to consider all objections fairly and *bona fide.* Attention is called to the article in this issue dealing with the cases on the duty of a Minister dealing with these hearings.

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2. *CHARITIES.*

Gift to persons "for such objects as they think fit"—character of legatee.—In *Re Norman,* [1947] 1 A. E. R. 400, the testatrix bequeathed her residuary estate "to the editors of the missionary periodical called *Echoes of Service* to be applied by them or him for such objects as they may think fit". The testatrix had been a missionary coming under the direction of the editors of *Echoes of Service,* who in fact largely controlled and supported the missionaries of her particular church.

Vaisey, J., held that the gift was a gift to the editors in their capacity as trustees and that they could apply the money to any of the missionary purposes and not, *e.g.,* to missionary purposes in China, where the deceased had worked. The learned Judge distinguished *Dunne* v. *Byrne,* [1912] A. C. 407 (gift to Roman Catholic archbishop) and *Farley* v. *Westminster Bank,* [1939] A. C. 430 (gift to "vicar and churchwardens") on the ground that in these cases the character of the legatee was not held to import a charitable intention. The published accounts of the *Echoes of Service* showed that substantially the whole of the sums collected were expended on missionaries and missionary effort, and in the learned Judge's opinion the case fell within the principle of *Re Garrard,* [1907] 1 Ch. 382, where a bequest to vicar and churchwardens to be applied in their sole discretion was held to be charitable as a gift for ecclesiastical purposes.

This case is an illustration of the difference in interpretation between a gift to a charity and a gift to trustees who may or may not apply the gift to charity. Where a charity is unincorporated and the gift is made to the trustees, there is good reason not to add too much definition or too wide a latitude to the objects of the gift. Where a gift is made to private persons not trustees as such of an established charity a good deal more circumspection may be necessary. But we may say again that, in doubt, a draftsman can always help himself by using the words "such charitable purposes" or "such of the following purposes being charitable . . ." or some other like words ensuring that the objects may be limited to charity. (2 K. & E. 299; Tudor, Charities 42.)

Maintaining a "Welsh Institute"—purposes beneficial to the community not charitable.—Williams' Trusts v. *I. R. C.,* [1947] 1 A. E. R. 513, is likely to prove a leading case on the highly problematical head of "trusts beneficial to the community". The opinion delivered by Lord Simonds was concurred in by all the other four learned Law Lords and lays down two principles which must be applied in all subsequent cases. Furthermore, both Lord Simonds and Lord Normand, the only two Law Lords delivering separate opinions, expressed doubts concerning earlier

decisions and in particular *Goodman* v. *Saltash,* 7 App. Cas. 633, in so far as that decision was based on the purpose being charitable as benefiting the inhabitants of a locality.

The case turned upon the income of a Welsh Institute in London which was founded for the purpose of "promoting the moral, social, spiritual and educational welfare of Welsh people and fostering the study of the Welsh language and of Welsh history, literature, music and art". It is obvious that this includes many charitable purposes, but the House of Lords, affirming the decision of the Court of Appeal (noted *ante,* Vol. 10, p. 115), held that the trusts were too wide not to authorise the application of funds to non-charitable objects, and that these purposes did not fall within Lord Macnaghten's four heads in *Pemsel* v. *I. R. C.,* [1891] A. C. 583, as being "beneficial to the community", not because the trusts were not beneficial to the community but because they did not fall within the spirit of the preamble to 43 Eliz. c. 4 which is expressly preserved by the Mortmain Act, 1888, s. 13 (2).

It is important to note that recent decisions on charities have now laid emphasis on two first principles which might have seemed to be in danger of being overlooked. First, we have the reaffirmation of the importance of the preamble to 43 Eliz. c. 4 coupled with the refusal to define what constitutes a legal charity. So, the House of Lords, while recognising that trusts for the advancement of religion are charitable, disallows a gift to vicars and churchwardens "for parish work": *Farley* v. *Westminster Bank,* [1939] A. C. 430, and the Privy Council rejected a gift to be employed "as such Archbishop may judge most conducive to the good of religion in the diocese": *Dunne* v. *Byrne,* [1912] A. C. 407, likewise, a gift for "charitable or benevolent purposes" is not a charitable bequest: *Chichester* v. *Simpson,* [1944] A. C. 341, because a benevolent object is not necessarily within the intent of the preamble to 43 Eliz. c. 4, though some persons might have thought benevolence at least as charitable as the maintenance of "houses of correction" especially mentioned in the statute. We should, however, observe that the purposes that are charitable are not *limited* to those mentioned but they must be within "the spirit and intendment" of that preamble. So, a gift to "my country England" was held valid in *Re Smith,* [1932] 1 Ch. 153, although, it is submitted, that the community of England is only indirectly within the spirit and intendment of the Act. Again, bequests to the Society for Prevention of Cruelty to Animals; *Re Douglas,* 35 Ch. D. 472 and for promotion of humane slaughtering of animals; *Re Wedgwood,* [1915] 1 Ch. 113 have been held charitable, though it is hardly conceivable that such objects could have been in the minds of the framers of the Act and, in fact, animals are not referred to, though, of course, the charity occurs in the elevation of human standards. On this head, indeed, there is a "wilderness of charity".

The second principle is that the charity must be "public". There was a time, perhaps, when "public" and "charitable" were confused and showed signs of becoming synonymous, but public purposes are definitely not necessarily charitable: *Blair* v. *Duncan,* [1902] A. C. 37; *Houston* v. *Burns,* [1918] A. C. 337. At the same time a trust which might be charitable if it was intended to benefit the public at large may cease to be charitable if intended to advance spiritual welfare: *Cocks* v. *Manners,* 12 Eq. 574; or the education of private persons: *Re Compton,* [1945] Ch. 123; or provide for pensions of workers: *Re Hobourn Components,* [1946] Ch. 194 (*ante,* vol. 10, p. 222). In this connection it was thought that there was a difference between a gift for the benefit of the inhabitants of a locality. As such they would have seemed to be able to enjoy a wide scope in the general gift, though a gift for "public purposes" would not be charitable: *Houston* v. *Burns* (*supra*). Consequently, where no

particular purpose is described it is assumed to be limited to charitable purposes: *Re Smith,* [1932] 1 Ch. 153; *Re Baynes,* [1944] 2 A. E. R. 597. In the case here noted Lord Simonds (at p. 521) points out this peculiarity and suggests, as it is submitted, that gifts to localities may be assisted by the generality of objects, but if a non-charitable purpose is included the gift must fail.

(2 K. & E. 299; Tudor, Charities 37.)

Cy-près—hostel for Dominion students—removal of "colour bar".— In *Re Dominion Students' Hall Trust,* [1947] L. J. R. 371 the Dominion Students' Hall Trust, a limited company, issued a summons to authorise a scheme varying the trusts of a deed, which limited the hostel to persons "of European origin"; and also a petition to alter the memorandum of association of the company. The purpose was to remove the "colour bar" established by the limiting words. As reported there was no evidence offered that the hostel could not be filled or that any of the purposes were over-subscribed and that, therefore, it was necessary to have a scheme to deal with any surplus. Evershed, J., held that he could authorise the scheme and sanction the alteration in the petition. There *was* evidence that the agreement of 75 per cent. in value of the subscriptions *had* been obtained and that there was no dissent among those who had answered.

The learned Judge pointed out that he had to bear in mind that funds cannot be applied *cy-près* unless it has been shown to be impossible to carry out the testator's intention, *Re Weir Hospital,* [1910] 2 Ch. 124; but the word "impossible" as a ground for varying trusts was construed widely. So, in *Re Robinson,* [1923] 2 Ch. 332, a condition that a black gown should be worn in the pulpit was, owing to changed conditions, regarded as "impossible".

It was said that changed circumstances might defeat the object of the charity and antagonise students, both white and coloured, whose support and goodwill it was the purpose of the charity to sustain. Furthermore, counsel for the Attorney-General did not feel that he could oppose either from the point of view of charity generally or of the original subscribers. Furthermore, there was evidence of further substantial support if the colour bar was removed.

It is thought that this case goes rather further than other reported decisions. Attention should be drawn to the fact that the learned Judge distinctly referred to possible greater discretion where the charity was not constituted by will. It does not attempt to suggest that a more "convenient" or "acceptable" charity; nor, it is submitted, is the decision intended to make any inroad into the principle in *Re Weir* (*supra*) that: "if the charity can be administered according to the directions of the founder, the law requires that it should be so administered": see *per* Cozens-Hardy, M.R., at p. 135.

The significance of the case is the greater latitude that is applied to the expression "change of circumstances". Some of the older cases are very strict in their attitude of non-interference, so that it could be said: "Accordingly, instances of charities of the most useless description have come before the Court, but which it has considered itself bound to carry into effect": *Philpott* v. *St. George's Hospital,* 27 Beav., at p. 112.

(Tudor, Charities, pp. 147, 171.)

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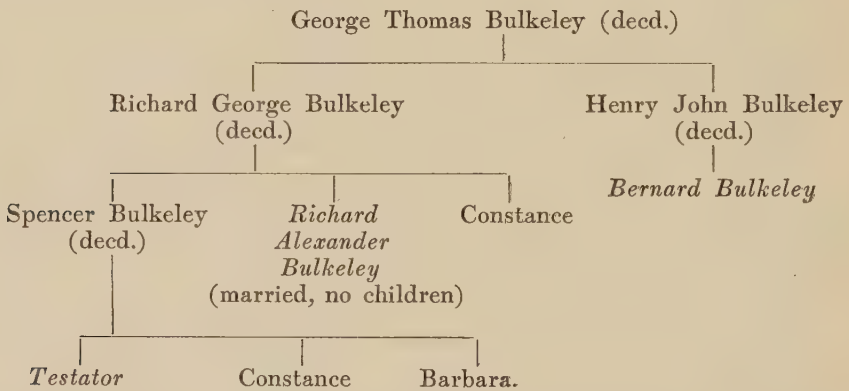
3. *WILL CASES.*

By J. H. C. MORRIS, B.C.L., M.A., of Gray's Inn, Barrister-at-Law.

Gift on death or marriage of X to issue living at death of X—implication.—Although the headnote to *Re Main,* [1947] 1 A. E. R. 255, occupies some thirty-two lines, the short point can be stated much more succinctly. There was a direction to divide a fund after the *death or marriage* of the testator's last surviving daughter between his issue living at the *death* of such last surviving daughter. The last surviving daughter married and accordingly the direction to divide took effect; but there was a hiatus in the will which would cause a partial intestacy unless it could be filled by implication, because the gift to the issue did not, according to the literal wording of the will, vest till the daughter's death. Roxburgh, J., held that the express mention of only one of the two relevant events was due to slovenliness or carelessness and that an immediate gift to the issue could be spelled out by implication.

(Theobald 273, 465.)

Gift to the "senior male of the next senior branch of the family".—In *Re Bulkeley* (1947), 176 L. T. 293, the testator made a home-made will in which he gave property to "the senior male of the next senior branch of the Bulkeley family". The following table shows the state of the family at the date of his death:—



It was argued (1) that the property passed to Richard Alexander Bulkeley, the testator's uncle; (2) that it passed to Bernard Bulkeley, the testator's first cousin once removed; (3) that the gift was void for uncertainty. Romer, J., held that Richard Alexander Bulkeley was entitled. Branches of a family could be founded by any common ancestor. It was natural for the testator to intend the nearest common ancestor who had founded male branches of the family, *i.e.,* his grandfather and not his great-grandfather.

(Theobald 287.)

Devise before 1926 *of realty—testator entitled in undivided shares—republication by codicil after* 1925*—whether gift adeemed by statutory trusts in Law of Property Act,* 1925, 1*st Sched., Part IV.*—In the well-known case of *Re Kempthorne,* [1930] 1 Ch. 268, the testator, who was a

solicitor, by his will made in 1911 gave all his freehold and copyhold property to X and all his personalty to Y, and died in 1928 without having altered or confirmed his will. He was entitled to undivided shares in realty which became converted into personalty on January 1, 1926, by reason of the statutory trusts contained in Part IV of the First Schedule of the Law of Property Act, 1925. It was held by the Court of Appeal that the testator's interest in the proceeds of sale of the land held in undivided shares passed to Y and not to X. The decision has often been criticised on the ground that the object of the schedule was to provide improved machinery and not to affect beneficial interests more than necessary. It may perhaps be justified on the ground that the testator, being deemed to know the law, might (for all the Court knew) have considered the impact of the Act on his testamentary dispositions and might (for all the Court knew) have decided to leave them unaltered, knowing that his interest in the undivided shares would pass to Y and not to X. However, the result was naturally not popular with the Judges, and there are two lines of cases in which a different decision has been reached: (1) if the testator's language is wide enough to carry all his interest in the property, no matter whether it is notionally converted into personalty or not, as when he gives "all my share or interest in . . ." (*Re Mellish,* [1929] 2 K. B. 82 n.); (2) if the testator confirms his will by a codicil executed after 1925 (*Re Wheeler,* [1929] 2 K. B. 81 n.; *Re Warren,* [1932] 1 Ch. 42). But if the language used can only be construed as a devise of real estate, and the testator dies without having altered or confirmed his will, the statutory trusts adeem the devise: *Re Newman,* [1930] 2 Ch. 409. In that case the testator gave "all my *share in*" the property in question, yet it was held that the principle of the first exception mentioned above did not apply, and that the gift was adeemed.

In *Re Harvey,* [1947] 1 A. E. R. 349, the testator by his will made in 1912 gave "all my *parts or shares in*" certain farms in Cornwall which he held in undivided shares. He made a codicil after 1925, but it merely referred to the will without confirming it and was therefore of a more tenuous character than the codicils in *Re Wheeler* and *Re Warren.* Had it not been for the awkward case of *Re Newman* (the correctness of which he doubted), Vaisey, J., might have held that the principle of the first exception applied. But he very properly refused to unsettle the law by drawing fine distinctions between "all my share in" and "all my parts or shares in". Instead, he held that the codicil sufficiently republished the will within the principle of the second exception, with the result that the statutory trusts did not adeem the devise.

(Theobald 146.)

Order of application of assets for payment of debts—gift of specific property on trust for payment of debts—whether statutory order excluded by contrary intention.—Section 34 (3) of the Administration of Estates Act, 1925, provides: "Where the estate of a deceased person is solvent his real and personal estate shall, subject to . . . the provisions if any contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II of the First Schedule to this Act".

In Part II of the First Schedule the order is as follows:—

"1. Property . . . undisposed of by will . . .

"2. Property . . . not specifically devised or bequeathed but included . . . in a residuary gift . . .

"3. Property . . . specifically appropriated or devised or bequeathed . . . for the payment of debts.

"4. Property . . . charged with or devised or bequeathed . . . subject to a charge for the payment of debts."

Paragraph 8 (a) repeats the rule that the order of application may be varied by will.

It is extraordinary that paragraphs 3 and 4 come so low in the order. There is grave difficulty in reconciling their low place in the order with the provision in paragraph 8 (a) that the order may be varied by will. For if the testator specifically appropriates property for the payment of debts within the meaning of paragraph 3, or charges it with the payment of debts within the meaning of paragraph 4, has he not varied the statutory order within the meaning of paragraph 8? If the testator does either of those things, a decision that the property specifically appropriated for or charged with the payment of debts ranks before residue does violence to the statutory order, while a decision that residue ranks first does violence to the testator's manifest intention.

In this dilemma Maugham, J., in *Re Kempthorne,* [1930] 1 Ch. 268, made the somewhat subtle suggestion that the fact that the testator has done the very things mentioned in paragraphs 3 or 4 does not *per se* amount to a variation of the statutory order. This suggestion does make the schedule consistent with itself, but only by attributing to the draftsman a singular inability to express a clear point in clear language (contrast section 35 (2) of the Act, where the draftsman says quite unambiguously that "such contrary or other intention shall not be deemed to be signified by" certain directions about debts).

The decision of Maugham, J., in *Re Kempthorne* was reversed by the Court of Appeal, but on quite a different ground. When the point arose again in *Re Littlewood,* [1931] 1 Ch. 443, Maugham, J., abandoned his former view and held that property specifically charged with the payment of debts ranked before residue. On the other hand, in *Re Gordon,* [1940] Ch. 769, Bennett, J., returned to Maugham, J.'s, original view. The testatrix gave a legacy of £50 on trust thereout to pay her debts. She made no gift of residue. It was held that property undisposed of ranked for payment of debts before the property specifically bequeathed.

Such was the embarrassing state of the authorities when *Re James* (1947), 63 T. L. R. 246, came before Roxburgh, J. The testator gave specific property on trust thereout to pay his debts and expenses, and also made a residuary gift. It was held, following *Re Littlewood* and distinguishing *Re Gordon,* that the debts and expenses were payable out of the property specifically given and not out of residue. The *ratio decidendi* was that the testator in the instant case intended not only to onerate the specific property but also to exonerate the residue, while in *Re Gordon* there could be no intention to exonerate the residue because there was no gift of residue at all. It is to be hoped that this decision will settle the law in accordance with the manifest intention of testators, whatever violence it does to the literal meaning of the schedule. It follows from this decision that residue will only rank before property specifically appropriated for or charged with the payment of debts in the rare event (which happened in *Re Gordon*) of the testator making no gift of residue at all.

In the tenth edition of *Theobald on Wills* (in the press), at p. 582, I submitted that the only distinction between *Re Littlewood* and *Re Gordon* is that in the former case there was a gift of residue and in the latter case there was not, but that this is a distinction without a difference. The reasoning of Roxburgh, J., in *Re James* has convinced me that the distinction, though fine, is a real one. It is submitted, however, that it is a lamentable state of affairs that such an ill-conceived schedule should have

driven the Judges to make these tenuous distinctions. As is well known, in order to displace the primary rule before 1926 that personalty ranked for the payment of debts before realty, there had to be not only words onerating the personalty but also words exonerating the realty. Although one of the main objects of the Administration of Estates Act, 1925, was to simplify the law of administration of assets, we are now nearly back where we started from.

(Theobald 694–695.)

Capital or income—distribution of realised capital profits by company.—The decision of Roxburgh, J., in *Re Doughty* (1946), 62 T. L. R. 525, noted *ante*, p. 116, has now been reversed by the Court of Appeal: (1947), 63 T. L. R. 257. A company had power under its articles of association by resolution to divide surplus capital moneys or capital profits in its hands amongst its members by way of capital distribution in proportion to their rights and interests in the profits of the company. Purporting to act under this power, the company passed a resolution that there should be declared out of realised capital profits an additional dividend or distribution to the shareholders of £99,100 in respect of the year 1945. The Court of Appeal following *Re Bates*, [1928] Ch. 682, and *Hill* v. *Permanent Trustee Company of New South Wales*, [1930] A. C. 720, and doubting *Re Ward's Will Trusts*, [1936] Ch. 704, held that the moneys must be treated as between tenant for life and remainderman as income and not as capital. A company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital. The company's article and resolution merely authorised distribution of capital profits in such a way that they could not attract income tax, and did not purport to deal with the question of capital and income as between tenant for life and remainderman.

(Theobald 446.)

Gift by implication—departure from literal wording of will.—There have been several cases in recent months in which the Courts have adopted a benevolent construction of the language of the testator, and construed his will in accordance with what he must have meant though not in accordance with what he literally said. Perhaps the record for benevolence is *Re Donald*, [1947] 1 A. E. R. 764, where the Court of Appeal reversed the decision of Evershed, J. The testator gave property to his adopted son John for life, and after his death to all the testator's nephews and nieces living at the death of John and to all or any of the children, living at the death of John, of any of the nephews or nieces who "*shall have died*" in the lifetime of John. One nephew died six months before John was born leaving a daughter who survived John. The Court of Appeal held that this daughter could take, though her father had not died in John's lifetime as the literal wording of the will required. But there was no indication whatever that the testator intended to exclude this daughter, and as Asquith, L.J., said, the literal construction created "an utterly capricious dichotomy between the children of a nephew who died before John was born and the children of a nephew who died after that date". It was fairly clear therefore that the intention of the testator was that living nephews and nieces and the children of dead nephews and nieces should take, and so the Court was justified in construing "shall have died in the lifetime of John" as "shall not be living at the death of John".

Lord Greene, M.R., made some observations of general interest. He said: "In cases dealing with the construction of wills, a comparison in parallel columns between the language used in wills which have been the subject of decided cases and that used in the will before the Court does not often lead to a useful result. On the contrary, it often tends to confuse". Those who like to think that a fondness for excessively literal interpretation is one of the besetting sins of the Chancery mind will be surprised to learn that in this case it was the common law Judge who had the greatest doubts.

(Theobald 544.)

Gift to children—whether illegitimate child takes.—In *Re Dicker,* [1947] 1 A. E. R. 317, the testatrix, who at the time when she made her will was eighty years of age, gave a share of residue equally between the children of her sister X (then aged seventy-seven) and, if more than one, to that child absolutely. She also gave a pecuniary legacy to "my nephew John X". The sister had never had more than one child, John, who was born before the marriage of his parents. He could not claim to have been legitimated by the subsequent marriage because his father was married to a third person at the time of his birth. The evidence as to the testatrix's knowledge of the facts only went to show that she knew that John's legitimacy was open to doubt. There was no evidence that she knew he was the only child.

Vaisey, J., held that John could not take. The fact that John was called a nephew in the gift of the pecuniary legacy was not within the dictionary principle of construction, because the word defined was nephew and not child: *Re Hall* (1887), 35 Ch. D. 551. The fact that the testatrix's sister was past the age of child-bearing and had had only one child did not enable that child to take by necessary implication, because it was not proved that the testatrix knew that he was the only child. Had the gift been to the sister's child in the singular, Vaisey, J., would have been prepared to hold that he could take, on the principle of *Re Eve,* [1909] 1 Ch. 796. In that case the testatrix aged seventy gave property to the children of her sisters A, B and C. A, who was aged sixty-eight, had had two illegitimate children. All the facts were well known to the testatrix and it was held that the two children could take. The present case is rather closer to *Re Brown* (1890), 63 L. T. 159, where the gift was to the children of the testatrix's niece M, and M was aged fifty and had had eight illegitimate children: but there was no evidence that the testatrix knew the exact age of her niece, and it was held that the children could not take.

The learned Judge regretted having to come to this conclusion. He strongly suspected that the verbiage of the clause in question was introduced into it by the draftsman in conformity with the wording of the other clauses relating to the other shares of residue. It was, of course, extremely probable that the testatrix intended her nephew John to take. But strong probability is not enough: *Re Pearce,* [1914] 1 Ch. 254, overruling *Re Du Bochet,* [1901] 2 Ch. 441.

Commenting on this case in the *Law Quarterly Review* (Vol. 63, p. 150), Professor Goodhart suggests that "it would be more in accord with modern ideas to hold that the word 'children' includes illegitimate children unless the context or the circumstances rebut this meaning". Such a revolutionary change in the law could only be made by legislation, but, apart from the difficulty of drafting such a statute, we do not think the suggestion will commend itself to conveyancers. The suggestion would mean that if a

wealthy family man gave his residue to his "children", and there was nothing in the context to confine the word to legitimate children, all sorts of claims might be presented by persons claiming to be his illegitimate children. Even if the claims were unfounded, the executors might well hesitate to distribute the estate without an order of the Court.

(Theobald 254, 256, 257.)

Capital or income—rule in Re Chesterfield's Trusts—testator entitled to property subject to a discretionary trust.—*Re Holliday* (1947), 63 T. L. R. 255, raises a novel point on that part of the rule in *Howe* v. *Lord Dartmouth* (1802), 7 Ves. 137, which is generally known as the rule in *Re Chesterfield's Trusts* (1883), 24 Ch. D. 643. The rule in *Howe* v. *Lord Dartmouth* says that where you have a residuary gift by will of personalty to persons in succession, the trustees must convert such parts as are of a wasting or hazardous nature and the tenant for life will only be entitled to a portion of the income pending conversion: it is a rule designed in the interests of the remainderman. The rule in *Re Chesterfield's Trusts* is a converse rule designed in the interests of the tenant for life: it says that where you have a gift by will of reversionary property to persons in succession, so that no income is actually produced until the reversion falls in, the trustees must ascertain the sum which, put out at interest at 4 per cent., and accumulating at compound interest with yearly rests, would produce the amount of the reversion when it falls in: the tenant for life will then be entitled to the interest which this sum produces.

In *Re Holliday* the testator, who died in 1927, gave his residue on trust for sale with power to postpone, and settled the proceeds of sale on persons in succession. Part of his estate consisted of an interest under a settlement dated 1895, made by his father, and under the will of his father, who died in 1898. The testator's interest under the settlement and will of his father was an interest subject to a discretionary power in the trustees to pay the whole or any part of the income to the testator's sister-in-law. The trustees of the settlement and will paid the bulk of the income to the sister-in-law till 1939 and the whole of it from that date down to the sister-in-law's death in 1942. Those entitled to income under the testator's will claimed that they had an equity to some apportioned part of the interest which fell in in 1942 in respect of the period from 1927. However, Romer, J., held that the testator's interest under the settlement and will of his father was not a reversionary interest in any true sense of the word at all, but an absolute interest, the income of which was temporarily charged in favour of a third person. It followed that those entitled to income under the testator's will must submit to the annual charge on income which existed from 1927 to 1942, and had no equity to an apportionment.

(Theobald 440, 447, 455.)

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4. *FAMILY LAW CASES.*

By R. H. Graveson, Ph.D., S.J.D., LL.M., of Gray's Inn, Barrister-at-Law.

Nullity of marriage—wilful refusal to consummate—legitimate child of marriage—delay in presenting petition—Dredge v. *Dredge* (*otherwise Harrison*), [1947] 1 A. E. R. 29.—The "startling state of affairs" disclosed by the facts of this case came before Willmer, J., on a husband's

petition for nullity on the ground of his wife's wilful refusal to consummate the marriage (Matrimonial Causes Act, 1937, s. 7 (1) (a)). Shortly, the facts were that the marriage had never been consummated due to the wife's refusal, and a child, conceived between the parties before marriage, was born six months after the marriage was celebrated in 1929, and was accordingly legitimate. The husband, a serving marine, continued to try to consummate the marriage until 1937, and in 1942 consulted the Services Poor Persons' Department.

The important question of law which these facts involve is whether the existence of a child conceived before, but born after marriage, affects the granting of a decree of nullity for non-consummation. Of the four grounds for avoiding a marriage contained in section 7 (1) of the Act of 1937, *i.e.*, (a) wilful refusal to consummate; (b) mental deficiency; (c) venereal disease; and (d) pregnancy of respondent by some person other than the petitioner, provision is made by section 7 (2) for preserving the legitimacy of children only in cases (b) and (c). So far as case (d) is concerned, it may be assumed that such provision was considered unnecessary, but in case (a), the one on which this petition was founded, in the words of Willmer, J., "I can only assume that the draftsman took the view that what has happened in this case could not conceivably happen. . . . Apparently, the possibility that a child might be conceived before the marriage and born afterwards had not occurred to the draftsman in the framing of this section of the Act" (at p. 30). Being satisfied on the remaining points, *i.e.*, the sincerity of the husband involved in the delay in presenting the petition, the question of non-consummation and of the wife's wilful refusal, the Court pronounced a decree *nisi* in favour of the husband. There was no legal ground on which relief could be refused.

The situation disclosed by this case calls for another exception to the general principle that the annulment of a marriage automatically bastardises any child of the marriage. The 1937 Act itself has created the two exceptions mentioned above, but so far English law has not accepted the principle *in itself* of treating the validity of a marriage and the legitimacy of children of the marriage as separate legal ideas. Valuable results have emerged in the law of many American States through this separation of the two questions. In *Dredge's Case* the husband was clearly entitled at law to the annulment of his marriage; but equally in justice the legitimate child of the marriage, who had been legitimate for seventeen years, should not be deprived of that status by some act or proceeding over which he has no control.

(Latey, p. 174.)

Nullity of marriage—non-consummation—acquiescence in use of contraceptives—Baxter v. *Baxter,* [1947] 1 A. E. R. 386.—The rule enunciated in *Cowen* v. *Cowen,* 114 L. J. P. 57, as to non-consummation of a marriage where contraceptives have been used is apparently causing some embarrassment. The Court of Appeal in *Baxter* v. *Baxter* considered a husband's appeal from the refusal to grant a decree of nullity on the ground of his wife's wilful refusal to consummate the marriage (Matrimonial Causes Act, 1937, s. 7 (1) (a)). The parties had been married for ten years, and had never once had intercourse except when the husband used a contraceptive. His wife, afraid of pregnancy, insisted on this method, and though the husband continually objected, he nevertheless continued on this basis.

The Court of Appeal, affirming the decision of Hodson, J., followed *Cowen* v. *Cowen* (above) in holding that the marriage had not been

consummated. But non-consummation is not enough under the 1937 Act. In the somewhat obscure language of the Court (p. 388) "the section requires proof that the non-consummation of the marriage was due to the wilful refusal of the respondent which is, we think, not the same thing as saying that the respondent wilfully refused to consummate the marriage". The difference would appear to lie in the operative words "due to". The Court considered that, on the facts, the husband had done less than he might in inducing his wife to have normal intercourse, and that non-consummation was due to his acquiescence in her insistence on the use of contraceptives. The reasoning is strained, and the distinction on which it is based somewhat artificial. However one looks at the facts, two points seem clear:—

(a) that the wife wilfully refused to consummate the marriage in the sense of *Cowen* v. *Cowen,* and that the husband, having tried and failed to consummate, finally petitioned for nullity, which is hardly an act of acquiescence;

(b) that, in the sense of this decision, there must always be acquiescence by one spouse in the use of contraceptives by the other, as the alternative is complete refusal of intercourse. Even in *Cowen* v. *Cowen* (above) this technical acquiescence must have existed.

The result is to place a narrow construction on *Cowen's Case,* a construction perhaps both necessary and desirable. In the words of the Court (p. 389): "A petitioner who only succeeds in proving a refusal in which he has acquiesced does not, in our opinion, establish that non-consummation is due to a wilful refusal by the respondent within the meaning of the statute."

(Latey, p. 174.)

Divorce—constructive desertion—requirements of desertion—husband's association with male servant—Buchler v. *Buchler,* [1947] 1 A. E. R. 319.—This appeal from a decision of Wallington, J., involved simple though unusual facts. The wife petitioned for divorce on the ground of her husband's desertion in that his conduct had caused her to leave the matrimonial home. The conduct complained of consisted in the husband's close friendship with one of his male servants, with whom he spent most of his time to the neglect of his wife. This friendship continued despite the wife's attempts to break it up, until finally the wife carried out a threat to leave the matrimonial home if the husband persisted in his association with his servant. There was no allegation or suggestion of any homosexual element in the association between the two men: the husband simply preferred his servant's company to his wife's. Nor was there any suggestion of any other matrimonial offence than the constructive desertion constituted by these facts. The husband cross-petitioned for divorce on the ground of his wife's desertion.

Lord Greene, M.R., in the course of his judgment, considered the essentials of constructive desertion, hesitating to allow a new cause for divorce to creep into the law under the guise of alleged constructive desertion. Mere unhappiness in the marital relationship not caused by cruelty does not entitle the spouse affected to leave home and then claim that the other spouse has been guilty of desertion: "It is as necessary in cases of constructive desertion as it is in cases of actual desertion to prove both the *factum* and the *animus* on the part of the spouse charged with the offence of desertion" (p. 320). Whereas in actual desertion the spouse charged must be shown to have abandoned the marriage relationship with

the intention of deserting, in constructive desertion the spouse charged must be shown to have been guilty of conduct equivalent to driving the other spouse away, and to have done so with the intention of terminating the marital association. One element without the other is not sufficient, though the intention in proper circumstances is readily inferred on the principle that no one can be heard to say that he did not intend the natural and probable consequences of his acts. Whether in any case the acts complained of are of a sufficiently convincing character is a question on which, in the words of the Master of the Rolls, a jury would require to be carefully directed, while it would be for the Judge to say whether the facts alleged were capable of being regarded as equivalent to an expulsion from the matrimonial home. On the facts of the case the Court was of opinion that the husband had not deserted his wife, because they did not amount to her dismissal from the consortium of marriage. Nor could they be made a ground for desertion by the wife's expression of intention of leaving her husband unless he changed his conduct. In the words of Lord Greene: "If conduct is not a justification for one spouse to leave another, it cannot be made so by threats of this kind. Moreover, if the conduct in question is in its nature insufficient, a statement that, if she did not like it she could go, even if taken at its face value, could not, in my opinion, give to that conduct the character of desertion in fact" (p. 325). Unhappiness is not a ground for divorce, but in the view of the Court "one of the risks that a man or woman takes in entering into the condition of matrimony" (p. 322).

Asquith, L.J., dealt with the wife's complaint that her husband preferred the company of the person of a very different social class. In his view, association with what it is fashionable to call a social inferior "is not on any view legally or morally wrong in itself and may well be a virtue in so far as it helps to break down senseless social barriers and class prejudices". Vaisey, J., agreed, and a decree *nisi* was granted to the husband.

(Latey, p. 92.)

Summary jurisdiction—maintenance order on ground of desertion—husband ordinarily resident in Scotland—Forsyth v. *Forsyth,* [1947] 1 A. E. R. 406.—This decision of a Divisional Court (Lord Merriman, P., and Jones, J.) decided an important point of jurisdiction of magistrates where the respondent husband was resident in Scotland. The husband had appealed against a maintenance order made by Middlesex justices in favour of his wife on the ground of his desertion. Until 1945 the parties were living with the husband's parents in Scotland, the husband being still in the Army, but due to overcrowding in the house the wife, at the husband's request, went to live in London. She did not hear from him again, and accordingly issued a summons in Middlesex which was served on the husband in Scotland under the Summary Jurisdiction (Process) Act, 1881. On behalf of the husband, it was protested that the English Court had no jurisdiction (*Armytage* v. *Armytage,* [1898] P. 178, and *Anghinelli* v. *Anghinelli,* [1918] P. 247). Lord Merriman, P., distinguished the origins of the two jurisdictions of justices and of the High Court, the former being based on a series of statutes and the latter on the principles on which the Ecclesiastical Courts pronounced a decree of divorce *a mensa et thoro,* and dealt with a number of differences in the extent of jurisdiction between the two Courts. The Court was clearly influenced in upholding the action of the justices by analogy of summary jurisdiction to hear complaints to that relating to criminal offences. The Summary Jurisdiction Acts constitute special legislation, extending the jurisdiction of the justices. In the

words of the President: "The residence of the offender may be where it is impossible to reach him, but, if it happens to be in Scotland, it seems to me to be reasonably plain that there is special legislation which brings him within the jurisdiction, and does so not merely when he can be found and arrested within the jurisdiction. Is there any reason why the same should not apply to a husband who has given rise to a cause of complaint which, in the words of section 4 of the Act of 1895, wholly or partially arises within the local jurisdiction of the justices?" (p. 414). The Court held that the justices had jurisdiction in the matter, and that the Scottish case *M'Queen* v. *M'Queen* (1920), 2 S. L. T. 405, was wrongly decided.

Desertion—refusal to continue sexual relations—parties living in the same home—Weatherley v. *Weatherley,* [1947] 1 A. E. R. 563.—It is now law that desertion shall not be defined. The hope expressed on the note of this case in the Court of Appeal (*ante,* p. 67) has not been fulfilled in the opportunity presented to the House of Lords by the appeal from the decision of that Court. It will be recalled that the husband petitioned for divorce on the ground of his wife's desertion, alleging that such desertion was constituted by her refusal to have sexual relations with him. The parties went about together and lived in the same flat. The Lord Chancellor remarked that the Judges in the many decided cases had wisely declined to attempt any definition of desertion, and in that respect he proposed to follow their example. The House of Lords in fact followed *Jackson* v. *Jackson,* [1924] P. 19, not only on the ground that it had been many times followed between 1924 and the passing of the Matrimonial Causes Act, 1937, but that Parliament may be assumed to have intended the word "desertion" to bear the same meaning in the absence of anything to the contrary in the Act of 1937. In particular, the dissenting judgment of Scott, L.J., in the Court of Appeal was disapproved by the House of Lords, on the ground that his reference to the purposes of marriage in the Book of Common Payer were inapt, since the legal effects of marriage must be the same for all persons whether the marriage is solemnised in a church or a register office, and whatever the religious beliefs of the parties to it. "Remembering those things", remarked the Lord Chancellor, "we shall, I think, find a solution to the question which arises for determination in this case and in similar cases, not on a consideration of the Christian doctrine of marriage as laid down in the Book of Common Prayer but on the true construction of the relevant Acts of Parliament."

Lords Wright, Uthwatt and Simonds agreed. Lord Normand, while agreeing with the decision of the House to dismiss the appeal, sounded a note of warning against the use of Scottish cases in England and English cases in Scotland on questions of desertion. In his view it was seldom that it could be profitable to cite Scottish decisions on divorce in an English case, or *vice versa,* as the two laws had material and substantial differences due to their history since the Reformation, which had not been removed by recent legislation.

(Latey, p. 95.)

Divorce—decree nisi—appeal pending—whether a bar to making decree absolute—Lloyd-Davies v. *Lloyd-Davies,* [1947] 1 A. E. R. 161.—The recent change in the period which normally has to elapse between decree *nisi* and decree absolute of divorce from six months to six weeks has given rise to a question which came before the Court of Appeal in this case. A

wife had obtained a decree *nisi* and, being anxious to remarry as soon as possible, applied to the trial Judge to have the decree made absolute before the normal six weeks had elapsed. Meanwhile, the husband had lodged an appeal against the decree *nisi*. Wallington, J., ordered that the cause should be listed for the making of a decree absolute on a certain date, and the husband appealed to the Court of Appeal for the decree absolute to be stayed. The Court made an order that the cause should not appear in the list for making the decree absolute until the husband's appeal had been determined. Lord Greene, M.R., considered the conflicting principles which the case involved, in that on the side of the husband there was an absolute right of appeal against the judgment, whereas the wife had a right that her decree *nisi* should be made absolute unless there was some valid reason why it should not be perfected. The husband's right to appeal could not be prevented merely because it might be vexatious, for whether or not there was any merit or foundation for the appeal was a matter for the Court of Appeal and not for the trial Judge to decide. The Court of Appeal realised the threat to this right to appeal which lay in the final and decisive nature of a decree absolute, and in the words of the President (at p. 163) "the right of appeal is absolute and is not to be in any way interfered with, and the Divorce Judge, when an application is made to him to make a decree absolute, must inform himself (he would naturally be informed) whether or not there is a pending appeal. If there is a pending appeal, in my judgment, he has no discretion or right to pronounce a decree absolute". The Judge is not entitled to ignore the existence of a pending appeal merely because he considers its object vexatious. The remedy in the hands of the wife who is anxious to remarry is to apply to the Court of Appeal for an early date to be fixed for hearing. The Court of Appeal was not prepared to impose on the husband as a condition of giving him the relief for which he was asking any condition or obligation as to expediting the hearing of his case.

(Latey, 13th ed., p. 306.)

Costs—liability of husband to give security for costs of wife's appeal against decree nisi of divorce—Roman v. *Roman,* [1947] 1 A. E. R. 434.—Morton, L.J., in the Court of Appeal, almost decided the question of whether that Court had jurisdiction to order a respondent husband to give security for the costs of his wife appealing against a decree made in the husband's favour. It was, however, not found necessary to decide the question in this case, but a short point of interest arose on the wife's motion for security for costs of her appeal against a decree *nisi* of divorce in her husband's favour. The wife was in receipt of £14 weekly from the husband under a Court order, and had valuable property of her own, and the Court of Appeal refused to grant the wife's application for security for the costs of her appeal. No case had been cited to the Court in which a party successful in the Court below had been ordered by the Court of Appeal to give security for the costs of an appeal by the unsuccessful party, and though the Court hesitated to pronounce on the jurisdiction in this matter, it went so far as to say that that jurisdiction, if it existed, was one which should be exercised sparingly, and there was no doubt that it should not be exercised in a case where the appellant wife had sufficient estate of her own to pay her own costs. Whether the Court of Appeal possesses and is prepared to exercise this jurisdiction remains undecided; but at least *Roman's Case* indicates one set of circumstances under which the jurisdiction would not be exercised.

(Latey, p. 270.)

Divorce—revival of condoned adultery—whether revival operates against co-respondent—Lloyd v. *Lloyd & Hill,* [1947] 1 A. E. R. 383.—In this case the husband petitioned for a divorce on the ground both of his wife's adultery with the co-respondent, which had been condoned, and of her subsequent desertion and adultery with the co-respondent. The husband claimed damages in respect of the condoned and the renewed adultery. There was no dispute that the adultery which had been condoned was revived, so far as the wife was concerned, by a subsequent matrimonial offence, but the co-respondent argued that it could not be revived against him as a basis for damages. "It seems to be an odd proposition", remarked Hodson, J., "that, because the co-respondent has nothing to do with the condoning or the revival, he should get the benefit of the condonation and not lose that benefit when the wife forfeits it by her own conduct in reviving the adultery" (at p. 383). The cases cited to the Court did not deal with the question of revival of a matrimonial offence which had been condoned (*Bernstein* v. *Bernstein* (1893), p. 292), and accordingly the Court granted the husband, the petitioner, a decree with damages and costs against the co-respondent.

(Latey, p. 264.)

Infants—custody and maintenance—whether justices have power to make an order under Guardianship of Infants Act, 1925, *s.* 3 (2), *when a maintenance order has been granted to the wife under the Summary Jurisdiction (Married Women) Act,* 1895, *s.* 5—*Re Kinseth,* [1947] 1 A. E. R. 201.—By virtue of the Summary Jurisdiction (Married Women) Act, 1895, as amended by the Married Women (Maintenance) Act, 1920, a Court of summary jurisdiction may make an order as to the custody of children of a marriage and provision that the husband should pay to the wife a sum not exceeding £2 a week for herself and 10s. a week for the maintenance of each child until attaining the age of sixteen years. By virtue of the Guardianship of Infants Act, 1925, a Court of summary jurisdiction, on making an order for the custody of an infant, has jurisdiction to order a person liable to maintain the child to pay a weekly sum not exceeding 20s. for the maintenance of the child. It has been the practice for certain Courts of summary jurisdiction to refuse to make an order under the Guardianship of Infants Act, 1925, in favour of the mother of the children who has applied for and obtained an order for her own maintenance under the Act of 1895 and failed or omitted in her application to ask for an order in respect of the children. Vaisey, J., in the Chancery Division, considered this practice to be misconceived, as depriving women who had been deserted by their husbands of the benefit of both the sets of statutes mentioned. The wife in *Kinseth's Case* had been deserted by her husband and obtained an order in her favour under the Act of 1895. She applied under the Guardianship of Infants Act, 1925, on legal advice, so that the Court would have power to make an order of £1 a week, which the father was willing and able to pay, and no objection was raised by his counsel to the Court's jurisdiction to make the order requested. But the justices refused to do so, on the ground that "since the complainant already has an order made in her favour under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 and 1925, it would be an evasion of the law to use both these statutes and the Guardianship of Infants Act at one and the same time, and, therefore, the justices hold that they have no jurisdiction to make a further order under the latter Act" (p. 202). It is somewhat curious to find a magistrates' Court resorting to the Continental doctrine of evasion of the law to justify a refusal to give relief for the benefit of

children of a marriage, whose welfare should be the Court's paramount consideration. There is, it is submitted, no doctrine of evasion in English law, certainly not in the English law of marriage. (See Graveson, "The Doctrine of Evasion of the Law in England and America", XIX Journal of Comparative Legislation 21).

(Latey, p. 381.)

Custody of infants—parents divorced—death of parent to whom custody awarded—whether third parties can apply for custody—Pryor v. *Pryor,* [1947] 1 A. E. R. 381.—In this case custody of the children of a marriage which had been dissolved had been given to their mother, who had died. The children had been cared for by their maternal grand-parents, who applied for an order for custody. No objection was raised by the father of the children. No testamentary disposition with regard to the guardianship of the two children had been made by their mother. The question before the Court was one of jurisdiction. In *Davis* v. *Davis* (1889), 58 L. J. P. 88, it had been decided on the Matrimonial Causes Act, 1859, s. 4, that an application to intervene on a question of custody could not be made by a third party after the death of a petitioner judicially separated, a case in which the facts were similar to those before the Court. Willmer, J., however, granted the leave to intervene in this suit, and gave custody of the children to the grand-parents, declaring that *Davis* v. *Davis* was no longer law, since section 4 of the Act of 1859 had been replaced by the substantially different wording of section 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, which gave the Court power at any time to "make such provision as appears just with respect to the custody, maintenance and education of the children", a much wider provision than the earlier one under which the Court had power to make such orders with respect to custody "as might have been made by such final decree (of judicial separation, nullity of marriage, or dissolution of marriage) or by interim orders in case the proceedings for obtaining such decree were still pending".

(Latey, p. 236.)

Husband's liability to maintain wife—desertion and failure to maintain—payments to wife by third party for necessaries—whether recoverable from husband—Weingarten v. *Engel,* [1947] 1 A. E. R. 425.—The equitable doctrine pronounced in *Deare* v. *Soutten* (1869), L. R. 9 Eq. 151, that "a person who has advanced money to a married woman deserted by her husband for the purpose of, and which has been actually applied towards, her support, is entitled in equity, though not at law, to recover such sums from the husband" was recently applied in the King's Bench Division to a case in which a husband, having left his wife, subsequently ceased to maintain her, and her brother paid in all £90 for the maintenance of her and her children. The Court was satisfied that the payments made were intended for the support of the married woman, in fact were needed for her support and had been used for the ordinary necessaries of life. It accordingly applied the equitable doctrine mentioned above. No reference was made to the decision of the Court of Appeal in *Rees* v. *Hughes,* [1946] 2 A. E. R. 47, noted in *The Conveyancer, ante,* p. 122.

Summary jurisdiction—wilful neglect to maintain—effect of unreasonable sexual demands—Holborn v. *Holborn,* [1947] 1 A. E. R. 32.—The essentially subjective test to be applied by magistrates in deciding whether the sexual demands made by one party to a marriage on the other party so as to justify the latter in withdrawing from cohabitation was emphasised by a Divisional Court (Lord Merriman, P., and Hodson, J.) in this appeal by the husband against a maintenance order made in favour of his wife. The justices had found that the husband's demands were not only such as to justify the wife in leaving him, but were affecting her health.

Certain points of interest emerge from this decision. In the first place the President pointed out that what will be regarded as grossly excessive demands in one case may be regarded as quite normal in another, and the test in every case is whether one party to a marriage has conducted himself or herself with a grave lack of consideration for the feelings of the other. In the particular case the husband's demands were "unreasonably inconsiderate". Secondly, there was nothing in the case to justify the making of a permanent separation order, and on evidence that the husband would treat his wife with due consideration she must return to him. Thirdly, the justices were entitled to make the order in respect of wilful neglect to maintain, overruling the husband's argument that such failure was due entirely to his wife's disappearing and deliberately keeping out of his way. (*Jackson* v. *Jackson* (1932), 146 L. T. 406, considered.)

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5. *INCOME TAX CASES.*

By Leonard Stein, Barrister-at-Law.

Income tax—amounts periodically borrowed from assurance society—whether loans or annuities—All Schedules Rules, r. 21.—The judgment of Macnaghten, J., in *C. I. R.* v. *Wesleyan and General Assurance Society* has been reversed by the Court of Appeal—[1946] Taxation Reports, 447. The facts of the case are summarised in the note on the decision in the King's Bench Division in *The Conveyancer,* December, 1946, at p. 124. In consideration of a single lump sum payment, the society had covenanted that on the policy-holder's death it would pay a sum quantified by reference to the number of months from the coming into force of the contract to the date of death. The policy-holder was entitled to obtain loans from the society, provided that the aggregate amount of the loans outstanding at any given date did not exceed the amount which would have been payable at the policy-holder's death had he died on that date. The loans bore no interest and were repayable only at death and out of the sum then payable by the society. The policy-holder having exercised his right to receive a regular succession of loans, rule 21 assessments were made on the society on the footing that the loans were, in truth and in fact, annual payments payable under deduction of tax. This view was rejected by the Appeal Commissioners but upheld by Macnaghten, J., whose decision, in turn, has now been reversed by the Court of Appeal. In delivering the judgment of the Court, the Master of the Rolls described the Crown's contentions as an attempt to revive the discredited doctrine of "substance", as distinct from "form"—"a doctrine which was, I hope, finally exploded by the decision of the House of Lords in the *Duke of Westminster's Case*", 19 T. C. 490. The legal relationship created by the contract, fairly construed, was that of lender and borrower. Had the parties chosen to frame the contract on different lines, the payments made by way of loan could equally well have been made by way of annuity. But because the contract was

so framed as to avoid tax, it did not follow that the Crown was entitled to brush aside the legal relationship created by its terms and to treat the loans as annuities under another name. This, said the Master of the Rolls, " seems to me to be re-writing the contract, and I can see no justification for doing so ".

Income tax—annuity partly free of tax—computation of amount payable —annuitant's accountability for tax recovered in respect of reliefs.—In *Re Arno,* [1947] Ch. 198, a testator who died in 1937 had made provision for the payment of an annuity of £1,200 and had directed that the annuity " shall be paid without deduction of income tax up to a maximum of 5s. in the £ ". No question could have arisen as to the amount payable by the trustees if the annuity had been either a tax-free annuity of £1,200 or an annuity of such amount as would, after deduction of tax, leave £1,200. But the form of words used by the testator was one which did not fit in with the Income Tax Acts, and the Court was asked to determine how it was to be construed. It was clear that in a year (if ever such a year should come again) in which the standard rate of tax was 5s. or less, the amount of the annuity would be simply £1,200 grossed to tax at the standard rate. But how was effect to be given to the testator's intentions in a year in which the standard rate exceeded 5s.? Affirming the decision of Roxburgh, J., the Court of Appeal held that the gross amount of the annuity must be taken to be the amount which, after deduction of tax at 5s., would leave £1,200; the net amount payable to the annuitant would be £1,200 less tax at the appropriate standard rate for the year in question. In other words, if the standard rate was 9s., the amount receivable by the annuitant would be £880. So far the Court of Appeal agreed with Roxburgh, J., but it did not agree with him on the further question whether the rule in *Re Pettit,* [1922] 2 Ch. 765, applied so as to require the annuitant to account to the Trustees for tax recovered by him in respect of reliefs and allowances. Roxburgh, J. took the view that the testator's reference to income tax was to be regarded merely as an arithmetical factor in the calculation of the gross amount of the annuity (see *Re MacLennan,* [1939] Ch. 750), with the result that the rule in *Re Jones,* [1933] Ch. 842, applied and the annuitant was not accountable to the Trustees. The Court of Appeal, on the other hand, was of opinion that the case was on all fours with *Re Bates' Will Trusts,* [1946] Ch. 83, and that here, as there, the testator meant to do no more than give the annuitant a partial indemnity against the income tax found ultimately to be payable in respect of the annuity. In *Bates' Case,* above, the words used were " clear of income tax " up to a certain rate, whereas here the annuity was directed to be paid " without deduction of income tax " up to a certain rate. It was held, however, that there was nothing in the distinction to warrant a different inference as to the testator's intentions. It was held, further, affirming the decision in *Bates' Case,* that there were no grounds for treating the rule in *Re Pettit,* above, as applicable only where the annuitant was given a complete indemnity against tax, and not merely a partial indemnity. The indemnity which the testator intended to give was a partial indemnity against the tax ultimately payable by the annuitant, and accordingly the annuitant must account to the Trustees for the appropriate proportion of such tax as he might recover.

Income tax and surtax—transfer of assets—income becoming payable to person abroad—Finance Act, 1936, *s.* 18.—In *Congreve* v. *C. I. R.*

(see *The Conveyancer*, September, 1946, at p. 71), which raised a number of important points under section 18 of the Finance Act, 1936, the decision of Wrottesley, J., in favour of the taxpayer has been reversed by the Court of Appeal—[1947] 1 A. E. R. 168. The statutory provisions in question are those concerned with avoidance of tax by transfers of assets resulting in income becoming payable to persons abroad. The Court of Appeal decided, in the first place, that in order that an individual may be charged with tax under these provisions it is not necessary to show that he was the person by whom the transfer was effected. A transfer of assets by A may result in B having " power to enjoy " income of a person abroad, and, if the other requirements of section 18 are satisfied, this will enable that income to be treated as income of B, notwithstanding that he was not himself the transferor. The next question to be considered related to the construction of the words " income becomes payable to persons resident or domiciled out of the United Kingdom ". Is the material date the date of the transfer or associated operation which resulted in income becoming payable to the person abroad, or is it the date at which that person became entitled to the income? It was held in the Court of Appeal that the latter view is correct. If the income sought to be charged arose to a person then resident or domiciled abroad, it will be no answer to show that he was not resident or domiciled abroad at the time of the transfer or associated operation. Lastly, the Court of Appeal dealt with the vexed question of the extent to which the income of the person abroad is to be treated as income of the taxpayer where section 18 applies. This rather obscure problem was discussed by the Master of the Rolls in *Lord Howard de Walden's Case* (1942), 25 Tax Cas. 121, but was there left to some extent in the air. The Court of Appeal has now decided it in the sense most unfavourable to the taxpayer. There is—it was held in *Congreve's Case*, above,—no ground for quantifying the income chargeable with tax under section 18 of the 1936 Act by reference to the source from which it arises and limiting it to income traceable to the assets transferred. However anomalous the result may be in certain circumstances, the language of the section requires that there shall be attributed to the taxpayer the whole of the income of the person abroad in so far as the taxpayer has " power to enjoy " that income within the statutory meaning of " power to enjoy ", irrespective of the extent to which the income arises from or is attributable to the relevant transfer of assets or associated operations. Such was the unanimous opinion of the Court of Appeal, which had, however, no hesitation in granting leave to appeal to the House of Lords.

Income tax—outright gift of shares by parent to infant children—whether dividends to be deemed income of parent—Finance Act, 1936, *s.* 21.—The main question which arose in the taxpayer's unsuccessful appeal from the decision of Wrottesley, J., in *Hood Barrs* v. *C. I. R.*, [1947] Taxation Reports, 433, was whether an outright gift of shares by a parent to his infant children constituted a " settlement " within the meaning of section 21 of the Finance Act, 1936, so as to require the dividends to be treated as income of the parent. In paragraph (b) of subsection (9) of section 21, above, " settlement " is defined as including " any disposition, trust, covenant, agreement, arrangement or transfer of assets ". It would appear at first sight to be indisputable that the gift of shares was a transfer of assets, but it was strenuously contended that, on the true construction of the interpretation clause, the transaction was not within the scope of the section. It was pointed out, in the first place, that section 21 of the Finance Act, 1936, replaces paragraph (c) of subsection (1) of section 20

of the Finance Act, 1922, and that the 1922 Act did not strike at outright gifts. It was argued that Parliament could not be supposed to have intended in 1936 to bring into the Act a class of transactions which had been left outside it in 1922. In delivering the judgment of the Court of Appeal, the Master of the Rolls brushed this contention aside but gave some attention to another line of argument based upon certain observations by Lord Macmillan in *Chamberlain* v. *C. I. R.* (1943), 25 Tax Cas. 317. That case arose under section 38 of the Finance Act, 1938, which is concerned with income arising under various types of settlements. For the purposes of that section, " settlement " is defined in section 41 (4) (b) of the Act as including " any disposition, trust, covenant, agreement or arrangement ". Commenting upon this definition in relation to the word " arrangement ", Lord Macmillan remarked that " a settlement or arrangement, to come within the statute, must still be of the type which the language of the section contemplates ". Applying these observations to the definition of " settlement " in section 21 of the 1936 Act, the taxpayer in *Hood Barrs' Case,* above, argued that the words " transfer of assets " must be limited by reference to the word " settlement ", and that, since an outright gift bore no resemblance to a settlement, it could not be a notional " settlement " within the meaning of the section. To this the Master of the Rolls replied that while the interpretation clause must, of course, be looked at as a whole and the expressions used in it construed in the light of their context, it did not follow, nor could Lord Macmillan be supposed to have meant, that no " arrangement " was to be treated as a " settlement " within the meaning of section 38 of the 1938 Act unless it could be brought within the category of settlements in the ordinary meaning of that expression. Similarly, in considering the definition of " settlement " in section 21 of the 1936 Act, the fact that what was being defined was the word " settlement " was no justification for a restricted construction of the expression " transfer of assets " so as to exclude transfers which did not partake of the nature of a settlement. For the purposes of section 21, the transfer of the shares was none the less a settlement because it was an outright gift to the children, and a gift to them direct without the interposition of a trustee.

Income tax and surtax—transfer of assets abroad—whether " power to enjoy "—Finance Act, 1936, *s.* 18.—On December 29, 1921, V., an individual ordinarily resident in the United Kingdom, granted to an English company a lease of certain lands situate abroad. The rent was made payable to A and B, being the intended trustees of a settlement about to be made by V. A and B were resident abroad. On the following day V. made a settlement of the rent in favour of such of his children and remoter issue as he should from time to time appoint. The settlement was irrevocable and no interest was reserved to the settlor. In 1935 V. made an irrevocable appointment in favour of his eldest son. On these facts the question arose in *Vestey* v. *C. I. R.,* [1946] Taxation Reports 405, whether the rent was to be deemed to be income of V. by virtue of section 18 of the Finance Act, 1936. Macnaghten, J., held that it was. In the light of the definition in subsection (5) of section 18, the grant of the lease must clearly be treated as a transfer of assets, and it resulted in income becoming payable to persons abroad, *viz.,* the trustees. Pending the execution of the settlement, the trustees were bare trustees for V., who, being beneficially entitled to the income, was able to control its application within the meaning of paragraph (e) of subsection (5) and must, therefore, be deemed to have " power to enjoy " it. He had, in fact, chosen to apply it by giving it away, but, once it was established that the

transfer had given him " power to enjoy ", it was—said the learned Judge —" immaterial to consider any disposition of the income . . . made subsequently by virtue of that power ". It was, he held, equally immaterial " whether they dribble it out quarter by quarter as it falls due or whether by a single operation they dispose of it once and for all ". In other words, though the settlement was unquestionably an " associated operation ", there was no necessity to take the transfer and the " associated operation " together and to consider their combined effect. In order that section 18 may be applicable, the rights by virtue of which there is " power to enjoy " may be acquired either by means of a transfer alone or by means of a transfer in conjunction with " associated operations ". This was a case in which they had been acquired by the transfer alone, and the income which, as a result of the transfer, arose to the trustees must be deemed to be income of V. The learned Judge went on, however, to make it clear that, even on the footing that the test was the combined effect of the lease and the settlement, V. would, in his opinion, still be caught by section 18. It was true that, the settlement (which was irrevocable) once executed, V. had ceased to have a free hand as to the destination of the income. But, his power to control the application of the income having been exercised by the settlement, it was he and no one else who continued to control it, so that, even after the settlement had been executed, he must still be considered to have had " power to enjoy " within the meaning of the section. By this reasoning the learned Judge reached the conclusion that, even though V.'s power to decide the destination of the rents had been exhausted and it had ceased to be possible for any advantage to accrue to him from the payments, they could still be deemed to be his income.

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6. *DEATH DUTY CASES.*

By Leonard Stein, Barrister-at-Law.

Succession duty—" property situate in Ontario "—locality of shares.— It has for some time been well settled that, in determining for death duties purposes the local situation of shares, the first matter to be ascertained is the place where transfers can be registered. There may turn out to be more than one such place. In *R.* v. *Williams,* [1942] A. C. 541, the Privy Council propounded the principle of rational selection. Where a choice is available, the question to be answered will be: In the actual circumstances of this particular case, what place would be preferred by a reasonable man as the place of transfer? Some further guidance on the subject has now been provided by the judgment of the Privy Council in *Treasurer of Ontario* v. *Blonde* and *Treasurer of Ontario* v. *Aberdein,* [1947] A. C. 24. Two distinct appeals were involved. In both the question at issue was whether certain shares were " property situate in Ontario " within the meaning of the Ontario Succession Duty Act, 1934. In the first case the shares were shares in a company incorporated in the State of Michigan, U.S.A., and could be transferred only in Michigan or New York. There was no transfer office in Ontario. The deceased died domiciled in Ontario and the share certificates were there at his death, but it was held that these circumstances were irrelevant; since the shares were not transferable in Ontario, it followed that they were not, within the meaning of the statute, " property situate in Ontario ".

The second case presented a more difficult problem. The companies in question were incorporated in Ontario. They were obliged by law to maintain a transfer office in Ontario, but they also maintained such an office

in New York. The deceased died domiciled in the State of Massachusetts and the shares were there at his death. Probate in Ontario was not a pre-requisite of the registration of the executors in the New York register. It was held that, in these circumstances, the principle of rational selection pointed clearly to New York, and that, accordingly, the shares were not "property situate in Ontario", notwithstanding that there was, in fact, a transfer office in Ontario and that its maintenance was a statutory obligation of the company, whereas it was under no obligation to maintain a transfer office in New York. It was not disputed that, according to the law of New York, the shares were not locally situate in that State, but it was held that the view on that point of the law of New York was irrelevant, the question being whether, according to the law of Ontario, the shares were locally situate in Ontario.

Estate duty—Irish settlement of Irish lands—proceeds of sale reinvested in England—whether situate out of United Kingdom—Finance Act, 1894, *s.* 2 (2).—The High Court of Eire has held that estate duty is payable in Eire in respect of English investments representing the proceeds of a sale of settled property consisting of Eireann land, and that notwithstanding that the trusts were declared by the will, in English form, of a testator who died domiciled in England—*Re Stoughton,* [1941] I. R. 166. The Revenue authorities here have never regarded the principle of this decision as correct, and it has not been applied in the first parallel case to come before the English Courts—*Re Midleton's Settlement, Cottesloe (Lord) and Cody* v. *Att.-Gen. and Midleton (Earl),* [1947] W. N. 101. The facts there were that certain lands comprised in a settlement executed in 1909 had been sold and part of the proceeds of sale had been invested in English investments. On the death of the tenant for life in 1942 the question arose whether estate duty was leviable in England in respect of the English investments. *Re Stoughton,* above, was cited as an authority for the proposition that the proceeds of a sale of settled property consisting of Irish land were, for revenue purposes, property situate outside the United Kingdom within the meaning of subsection (2) of section 2 of the Finance Act, 1894. This contention was rejected by Roxburgh, J., who held that there was no English statute which required the English investments to be treated for estate duty purposes as notionally equivalent to the Irish lands, and that, in the absence of any such statute, the words "property . . . situate out of the United Kingdom" must, in relation to these investments, be given their natural and ordinary meaning.

THE LIBRARY.

"The Simplex" Client's Instructions Forms. Published by Sweet & Maxwell, Ltd. 4s. per dozen, plus 1s. 1d. purchase tax.

Few solicitors, it is thought, make a practice of using specially prepared forms for clients' instructions. Provided that the instructions are taken down on foolscap paper and not on small scraps which tend subsequently to conceal themselves, those instructions generally find their way to the file and stay there. But few solicitors will deny that it is often necessary to expend further time in obtaining from clients instructions which are necessary and which would have been obtained originally if a suitable reminder of the essential points had been at hand when the client called.

The Simplex Instructions forms seek to minimise this. Seventeen forms have been prepared, ranging from Wills (Form 1), Purchase and Sale (Forms 6 and 7), to Running Down—Plaintiff and Defendant (Forms 16 and 17). To the busy

practitioner such forms should be of great use. The forms in connection with Sale and Purchase are both excellent, and the reminders on the Purchase form concerning searches, registration, and insurance should prevent the solicitor or clerk to whom the work is subsequently entrusted from overlooking essential matters of this kind. One addition to the form may be suggested, namely, that the query against the words "Convey by plan" might be deleted and the note might read "Require plan on Contract: obtain Client's approval", and a number of the items appearing on the Sale form might profitably be added to the Purchase form, *e.g.*, Standard Rent (verify); War Damage? Licence to assign? However, every solicitor using these forms will, no doubt, develop his own technique. The main point is that the forms contain the essential reminders, and at the same time provide a neat and orderly record of the instructions.

E. O. W.

The Death Duties. By Robert Dymond, assisted by R. K. Johns. First Supplement to the Tenth Edition. Solicitors' Law Stationery Society.

The new edition of *Dymond on Death Duties,* which was noticed in the December, 1946, issue of *The Conveyancer,* is to be kept up to date by periodical supplements. The first of these has now appeared and deals with two main topics—the Death Duties provisions of the Finance Act, 1946, and the arrangements recently concluded with the United States, Canada and South Africa for the avoidance of double taxation. The necessarily complicated machinery devised for this purpose is explained as lucidly as the nature of the subject-matter permits. There are useful notes on recent judicial decisions relating to Death Duties, of which the most important is that in *Re Cassel's Will Trusts,* [1946] 1 A. E. R. 704, with regard to the incidence of Estate Duty payable on the cesser of annuities.

L. J. S.

The Conveyancer's Year Book, 1946. Editor: R. E. Megarry, of Lincoln's Inn, Barrister-at-Law. Contributors: B. G. Burnett-Hall, of Lincoln's Inn, Barrister-at-Law; Michael Bowles, of Gray's Inn and the Inner Temple, Barrister-at-Law; K. J. T. Elphinstone, of Lincoln's Inn and the Inner Temple, Barrister-at-Law; C. A. Newport, F.C.R.A. 1947. London: The Solicitors' Law Stationery Society.

This Year Book really deals with the year 1945 and its delay is due to acute pressure of work and a long illness at a critical juncture of the principal editor, Mr. Megarry. The contributors are responsible for certain sections; *e.g.*, Mr. Burnett-Hall for that on Charities, and Mr. Bowles for those on Death Duties, Wills and Intestacy. The character of the work is so well known that it hardly calls for detailed comment here, except to say that the field seems to grow ever wider, *e.g.,* on p. 19 there is a reference to the Cohen Report and articles thereon (substance not given) and a bracketed statement that a Bill has been introduced into the Lords. More useful is the reference to a notice of the Ministry of Education on the opposite page concerning registration of a conveyance for educational purposes, but it was issued in October, 1945.

We realise, none better, the great difficulty in bringing matter out quickly, but a current survey such as this must be prompt to be valuable or else more topical matters could be omitted. But this work is well done and users of it will find it better than ever.

Duty and Art in Advocacy. By the Hon. Sir Malcolm Hilbery, a Justice of the King's Bench Division. 1946. London: Stevens & Sons, Ltd. (6s.)

Advocacy is what the pure conveyancer seeks to avoid, but it is a fascinating study. When it is the subject of a discourse by a master who has to listen to all

sorts and conditions of it anyone will enjoy the result. It may not be necessary but this little book of some thirty-five pages is wholly delightful.

Law Quarterly Review, Vol. 63 (January and April Nos.). Editor: A. L. GOODHART, K.C., D.C.L., LL.D., Professor of Jurisprudence in the University of Oxford. London: Stevens & Sons, Ltd.

Apart from the usual features of notes of cases and reviews there is no article of outstanding importance to the conveyancer. Professor Winfield on the Action on Quasi-Contract for Work Done shows the hand of the master and should the point arise Mr. Welsh's article on Legitimacy in Conflict of Laws will require attention. Professor Wade's article on the Courts and the Administrative Process should be read by all those who wish to analyse the problem that now faces all lawyers—how to deal with the exercise of administrative discretion that adversely affects his own clients. Professor Wade does not provide the solution, but from his opening words we hope that we may at least expect guidance.

Layman's Law. The Law of Wills. By RUPERT CROSS, M.A., B.C.L., Solicitor.

Legal Aid for the Poor. By ERNST J. COHN, Ph.D., Barrister-at-Law, and ROBERT EGERTON, M.A., LL.M., Solicitor.

These are two more of the series "This is the Law". They are primarily for the non-professional reader and as such prove interesting reading for the practitioner. It is looking at himself as nearly as possible from the outside.

So far as legal aid to the poor is concerned the picture has its dark and its bright side. There is too little provision in some matters, particularly in litigation in the county court and perhaps even more in advice on how to avoid disputes. After all, it represents that large field normally falling within the conveyancer's sphere that doubts and difficulties should not mature into open rupture. Another weakness is that the "ceiling" of poverty is put too low and there seems to be no real means of tempering the wind to the shorn lamb short of absolute relief. The doctors manage it better.

The bright side is the amount of purely voluntary work which is done without hope of return. A State legal service, *i.e.*, one governed by some form of insurance, is not an impossible answer, but we shall lose much by it. It is the old problem of balancing loss and gain and the profession should read what is now being done and see where they can fit in.

A layman's guide to the law of wills is very difficult. It has always seemed to us that the lawyers of Lincoln's Inn should erect a monument or cenotaph to "the Unknown Testator who made his own will". But for divers psychological reasons he will continue to go on doing it—but he should read Mr. Cross's book first.

The Modern Law Review. Vol. 9, No. 3. London: Stevens & Sons, Ltd., for the Modern Law Review, Ltd. Quarterly 6s. Subscription for 1947 20s.

Apart from the usual notes on statutes and cases and reviews this number contains three articles of immediate interest to all practitioners. Mr. W. H. D. Winder considers the effect of precedents decided by Divisional Courts. Though appellate in character Divisional Courts are in an unusual position and this is discussed by the article. Dr. O. Kahn-Freund discusses the Cohen Report on Company Law Reform. This is a stimulating article and deserves study by all concerned with company law, but practitioners should bear in mind that it appears to be affected by certain dogmatic assumptions of a doctrinaire character. So, for

example, the learned writer asserts (at p. 238) that the Committee have "ignored the fiction of corporate personality". Precisely what is meant by the "fiction of corporate personality" is not clear to this reviewer, but at least it is an attitude towards personality, corporate or otherwise, that is open to challenge, and in our opinion leads to fallacious views, such as are implied by the hint that *Salaman* v. *Salaman* is bad. The result of *Salaman* v. *Salaman* in terms of morality may sometimes be bad, but that has nothing to do with the validity of the decision or principle, or so it would seem to this reviewer. So, again (at p. 251), the learned writer refers to the "unreal separation of 'legal,' and 'economic' policies". To our view one of the tragedies of modern legal writing of the more academic or ambitious sort is the constant itch to introduce as reasons for legal rules made by lawyers that they should have "economic" or "social" or "moral" background. In our view the less the lawyers have to do with these transient matters the longer is our common law likely to flourish. But while watching for these tendencies and giving criticism such modifications as they demand this article deserves very careful attention. Lastly there is Mr. L. C. B. Gower's article on the Future of the Legal Profession. This covers all the ground, including the training of articled clerks and recruitment of both branches of the profession. It is radical in all senses. Needless to remark, it is probable that very few members of the profession would agree with it absolutely, and the measure and subjects of agreement would vary vastly, but it should be read.

The Law Quarterly Review. Vol. 62, No. 248.

The October 1946 number of the *Law Quarterly Review* does not, apart from its usual features of notes of cases and reviews, contain much of special interest to conveyancers. There is an article (by Mr. W. Horrwitz) which is an outline sketch of the development of company law. Two sentences very near the end indicate its character. They read: "This brief survey shows that the foundations of modern British company law were laid in 1856 when liberalism was at its peak. The guiding principle then fixed was fullest freedom for shareholders in the formation and management of companies on the condition that fullest information was given to the public." We wonder how far a very thorough investigation would support these several statements, but in particular what the learned writer means by liberalism. The learned writer then goes on to observe a few lines later: "On the other hand, with waning liberalism the principle of absolute freedom for shareholders was bound to lose ground". While statute law inevitably should express more fully political tendencies than case law—indeed, that is the real purpose of statute law, to enable law reform on those principles—nevertheless the connection between "liberalism" in any ordinary political sense and "company morality" does seem a little obscure. But perhaps we have misunderstood Mr. Horrwitz, and he has many interesting observations to make.

More Legal Fictions. Reported by A. Laurence Polak, B.A., Solicitor. Illustrated by Diana Pullinger. London: Stevens & Sons, Ltd. 1946. (Price 6s.)

This is a second series of imaginary cases, such as the learned author did for the classics, but this time based upon Shakespeare's plays. They first appeared, as did the earlier "cases", in *Law Notes.* The "judgments" have the merit that they contain prophecies, based on subsequent decisions, of what the law was to become after the death of Shakespeare.

Where to Look for Your Law. Ninth edition. By R. Hilary Stevens. London: Stevens & Sons, Ltd. 1946.

This production of Mr. Stevens is very useful, as is evidenced by the fact that the fifth edition was published in 1935 and the seventh edition had to be reprinted. In effect it contains a classified index of works in which the topics are dealt with as

well as monographs on the particular, and a list of books catalogued under the name of the author. The dates of publication are given. It is not exhaustive; so, for example, there seems no ground for including under Negligence, Roscoe—Civil Actions, but not Clerk & Lindsell. Some of the marking by asterisk of "leading text-books" is also peculiar. Potter—Historical Introduction, is so marked, but Pollock & Maitland is not, and under conveyancing precedents we can hardly be expected to agree to the omission of an asterisk for *The Conveyancer*! But we think the arrangement and grouping good. The work also contains a table of law reports and abbreviations with reference to English Reports where relevant. Altogether a very useful publication.

Lawyer's Companion and Diary, 1947. Edited by ARTHUR E. SMITH, Order Department, Central Office of the Supreme Court, and by LESLIE C. E. TURNER. London: Stevens & Sons, Ltd., and Shaw & Sons, Ltd. (Price 19s. 2d. net.)

The hundred and first annual issue of the *Lawyer's Companion* contains the usual features. So far as we have checked it the useful reference matter, such as fees and death duties, is up to date. The Law List is of course based on that of the preceding year. Owing to the inevitably considerable number of changes during the year caused by shortage of chambers and office accommodation this is a serious drawback, but it is difficult to see how it could be altered without some change of machinery.

BOOKS RECEIVED.

Statute Law relating to Employment. By F. N. BALL, LL.B., Solicitor. London: Stevens & Sons, Ltd. (25s.)

The Modern Law Review. Vol. 10 (Nos. 1 and 2). London: Stevens & Sons, Ltd. (Subscription per year 20s.)

World Affairs. Vol. 1 (No. 2). Editors: G. W. KEETON and G. SCHWARZENBERGER. London: Stevens & Sons, Ltd. (2s. 6d.)

Short Sketches of English Local Government Administration. By B. SEN, of Gray's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. (3s.)

PRECEDENTS

Form 1.

Assent by the Personal Representatives of a Deceased Owner or Tenant for Life of Freehold Lands to the Vesting of the Lands in Themselves for a Long Term of Years to Protect Them Against Liability for Death Duties (*a*).

(*Drafted by A. H. Withers, of Lincoln's Inn.*)

KNOW ALL MEN BY THIS ASSENT that A of *etc.* and B of *etc.* (hereinafter called " the Representatives ") do hereby this —— day of —— 19— declare as follows :— Parties.

(*a*) Stamp to be adjudicated.

On the death of the estate owner, whether an absolute owner or a tenant for life, the legal estate passes to his personal representatives who become liable to discharge the death duties then payable. Such personal representatives may, as a condition of granting an assent or making a conveyance, require security for the discharge of such duties, but they are not entitled to postpone the giving of an assent merely by reason of the subsistence of such duties if reasonable arrangements have been made for discharging them, and an assent on conveyance may be given subject to any legal estate or charge by way of legal mortgage: see Administration of Estates Act, 1925, s. 36 (10).

Where the deceased was an absolute owner an assent is not immediately essential as the personal representatives have the powers of management conferred by the Administration of Estates Act, 1925, s. 39, and an assent can be postponed in many cases conveniently until the duties have been discharged, unless the persons entitled to the land subject to assent insist on their rights under s. 36 (10).

On the death of a tenant for life, the legal estate in the settled freeholds usually vests in his legal personal representatives who must, on being required so to do, transfer the legal estate to the person entitled thereto (see Settled Land Act, 1925, s. 7 (1)) subject to their being properly indemnified against duties payable on such death and the interest thereon and costs in respect thereof (see Settled Land Act, 1925, s. 8 (3) (b)).

In some cases, personal representatives give an assent at once. In others, the personal representatives refuse to assent before all duties have been paid. The withholding of an assent gives rise to practical difficulties, more especially in the case of settled land.

The personal representatives of a deceased tenant for life can sell or mortgage to pay estate duty (see Finance Act, 1894, s. 9 (5)) and can mortgage to pay succession duty (see Succession Duty Act, 1853, s. 44). The Law of Property Act, 1925, s. 16 (3) confirms such powers, but does not seem to increase them. The Settled Land Act, 1925, s. 26 (1), gives special powers during the minority of infant tenants for life, etc. Subject as above stated, the personal representatives of a deceased tenant for life appear to have no powers or duties in respect of the settled estate, and no provision has been made in the Settled Land Act, 1925, for the period between death and assent. The result is that, pending assent, the personal representatives have no powers of management—*e.g.*, of employing servants and paying outgoings—and there is no one in a position to grant, or accept surrenders of, leases and tenancies, and the persons entitled beneficially are unable, by sale or mortgage, to clear off or reduce the death duties.

It is very undesirable that personal representatives should withhold assent and thus prevent the estate being developed and dealt with in the ordinary way.

The question then arises, how can the reasonable requirements of nervous personal representatives be best dealt with? They appear to be entitled under the Settled Land Act, 1925, s. 8 (3) (b) only to be " effectually indemnified " against duties, interest, and costs; they do not appear to be entitled to actual provision for payment of the duties. But personal representatives may fairly say that only a provision which directly and adequately provides for payment of the duties is an " effectual indemnity ". If personal representatives take up this attitude, what is to be done?

The form here set forth is an attempt to provide the personal representatives with all they can possibly want. If payment of duties is unduly delayed, they can step in and exercise their statutory powers. Until then, they have to concur in reasonable dealings

Definition clause.

1. In this assent the following expressions have the following meanings that is to say:—

(A) "The Deceased" means C of *etc.* who died on the —— day of —— and whose will was [(in respect of settled lands which were vested in him at his death under —— and remained settled notwithstanding his death)] proved by the Representatives on the —— day of —— in the —— Probate Registry

(B) "The Scheduled Lands" means the freehold lands and premises specified in the Schedule hereto

(C) "The term Trustees" means the Representatives or other the trustees or trustee from time to time of the trusts declared by this assent of the term hereby created

(D) "The Death Duties" means the moneys payable or repayable under the trusts of paragraph (A) of clause 4 hereof.

No previous assent.

2. The Representatives (*b*) have not as personal representatives of the deceased given or made any assent or conveyance in respect of a legal estate in or affecting the scheduled lands or any part thereof.

Assent for term of years.

3. The Representatives hereby assent to the vesting in the Representatives of all the scheduled lands for the term of 3,000 years from the date hereof without impeachment of waste.

Trust to pay death duties.

4. (A) The term trustees shall hold the scheduled lands for the said term of 3,000 years upon trust to sell the scheduled lands and out of the proceeds of such sale to pay all estate and succession duties payable on the death of the deceased in respect of the scheduled lands and all interest on such duties and all costs incurred in or about the execution or exercise of the trusts and powers of this clause and to repay to the Representatives or their respective personal representatives or estates all sums paid by them or any of them or out of their or any of their estates in or towards discharge of such duties interest and costs

Powers of representatives.

(B) The Representatives and the [survivors or] survivor of them shall retain and have over the scheduled lands all such powers as under sub-section (5) of section 9 of the Finance Act 1894 or otherwise they or any of them have for raising the death duties or any part or parts thereof

Limit on representatives' powers.

(C) The foregoing trust and powers shall not be executed or exercised during the period of —— years from the date hereof so long as

(1) no step or proceedings is taken to make the Representatives their executors or administrators or any of them personally pay the death duties or any part thereof and

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with the estate. The form may want modifications and additions in particular cases. But a draft on the lines of the above form will make a convenient basis of discussion, and with minor alterations should suit most cases.

The form contemplates that the lands consist of freeholds only and that the creation of the term of years will be followed by an appropriate assent (vesting or otherwise) in respect of the freehold reversion which should be expressed to be subject to the term and to the trusts thereof.

Presumably the representatives will want to retain the title deeds in case they have to sell, etc., but their retention of the muniments of title may be exceedingly inconvenient and expensive. It would in most cases be better for the owner of the freehold to have the title deeds and to give the representatives an acknowledgment for their production than for the opposite arrangement to be made. However, when representatives part with the deeds they should register a land charge under the Land Charges Act, 1925, s. 10 (1), Class C (i).

(*b*) See the Administration of Estates Act, 1925, s. 36 (6).

(2) no interest on or any principal sum payable in respect of any estate or succession duty (forming the death duties or any part thereof) is more than one year in arrear

Duty of trustees to concur in sales.

(D) So long as the provisions of paragraph (C) of this clause are in force the term trustees shall at the request and cost of the person or persons from time to time interested in or having the requisite powers over the scheduled lands in reversion expectant on the expiration or sooner determination of the said term of 3,000 years concur in such manner in all such transactions and dispositions affecting the scheduled lands or any part thereof as such person or persons may reasonably require provided that (1) the security hereby afforded to the Representatives is in the opinion of the term trustees not materially diminished by such transactions or dispositions and (2) all capital moneys arising under such transactions or dispositions (less the reasonable legal and other costs properly payable thereout) are paid in or towards satisfaction of the death duties or are paid to the term trustees who shall forthwith pay the same in or towards satisfaction of the death duties

Declarations against merger and provisions for surrender.

(E) The said term of 3,000 years is hereby created merely to indemnify the Representatives against all personal liability in respect of the death duties and the costs and expenses incurred in respect thereof and such term shall not (so long as any money is raisable thereunder) merge in the fee simple retained by the Representatives (*c*) and such term shall be surrendered and released when the death duties and costs shall have been fully paid

Application of s. 113 of the Law of Property Act, 1925.

(F) The provisions of section 113 of the Law of Property Act 1925 shall apply hereto in the same manner as if within the meaning of that section this assent were a mortgage and the scheduled lands were mortgaged property and the death duties were mortgage money

Application of surplus rents and profits.

(G) Subject to the trusts hereinbefore declared concerning the said term and to the right of the trustees thereof to raise by any of the means aforesaid and pay or reimburse themselves all costs and expenses incurred in relation to the said trusts the rents and profits of the scheduled lands or so much thereof as shall from time to time remain after satisfying the aforesaid trusts shall be permitted to be taken and received by the person or persons for the time being entitled to the same premises in reversion immediately expectant upon such term.

AS WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

[*Particulars of the lands to which the above written assent relates.*]

(*c*) This assent will be executed prior to any vesting assent in favour of the beneficiary entitled, so that until the assent is executed the trustees will hold both the term and the fee. This declaration will prevent the term merging in the reversion, before the latter is vested in the beneficiary entitled to require an assent to be executed in his favour.

Form 2.

Precedent of Agreement for Periodic Tenancy of Agricultural Land for Periods of 364 days each (*a*).

Parties.

AN AGREEMENT (*b*) made this —— day of —— BETWEEN A B of —— in the County of —— (hereinafter called "the landlord" which expression shall include the person or persons for the time being entitled to receive the rents hereby made payable) and C D of —— in the County of —— (hereinafter called "the tenant" which expression shall include his executors administrators and assigns where the context so admits):—

Agreement for tenancy.

1. The landlord agrees to let and the tenant agrees to take ALL THAT messuage [cottages] farm and land (hereinafter called "the Farm") situate in the parish of —— in the County of —— known by the name of —— Farm the quantities and particulars whereof are set forth in the Schedule hereto TO HOLD the same from the 1st day of October 19— to the 29th day of September 19— [*the next year*] and thenceforward from the 30th day of September 19— for the term of 364 days and thereafter for successive periods of 364 days from the 29th day of September 19— [*the succeeding year*] determinable as hereinafter mentioned.

Notice to determine.

2. This Agreement may be determined by either party thereto at any time during the currency of the said term or any successive period [*or* on the said 29th day of September 19— or at the end of any

(*a*) This Form is contributed by Mr. J. B. Richardson, Barrister-at-Law.

(*b*) This Form is intended to exclude the operation of the Agricultural Holdings Act, 1923. A periodic tenancy for successive periods of 364 days each has been held by the Court of Appeal not to be within the Act: *Land Settlement Association, Ltd.* v. *Carr*, [1944] K. B. 657. Until that decision the more usual practice was to let for a term of 364 days and at the expiration of each term to renew for a further term of 364 days. This involved a fresh agreement at the end of each period, whereas an agreement in the Form here given does not involve any such renewal but the tenancy continues until terminated by notice.

Conveyancers using the above Form should, however, recollect that there is considerable likelihood of the decision of the Court of Appeal being overruled by fresh legislation, but there is much less chance of future legislation that the letting for a fixed term of 364 days should come within the Act. This Form can easily be adapted to a letting for such fixed term.

The provisions of the Act do not (as the law now stands) apply to any such letting. The most important consequences are:—

1. There will be no compensation for disturbance or for improvements under the Act. The custom of the country will, however, apply to the tenancy unless it is expressly excluded.

2. The provisions as to length of notice to quit do not apply, and the tenancy can be made terminable at any time by any length of notice. As it is not certain what length of notice is at common law required to terminate such a tenancy an express provision as to the length of notice required should be inserted.

3. There will be no freedom of cropping as regards arable land as s. 30 of the Act will not apply. Hence any provisions as to the course of cropping or otherwise as to cultivation of the land can be enforced.

4. There is no implied right of entry for the landlord to view the state of the holding. This right must be expressly reserved.

5. No arbitration under the Act is possible even by agreement. If there is an express provision for arbitration this will be under the Arbitration Acts, 1889 to 1934.

6. Fixtures. The tenant will have no right to remove fixtures (*Elwes* v. *Maw* (1802), 3 East 38; 2 Smith's L. C. (13th ed.) p. 193) except under the inadequate provisions of the Landlord and Tenant Act, 1851, s. 3. A provision ought therefore to be inserted giving the tenant power to remove such fixtures, *e.g.*, as provided by the Agricultural Holdings Act, 1923, s. 22.

successive period] giving to the other —— months' previous notice to quit in writing.

3. The rent shall be £—— for the tenancy period of 364 days and shall be payable in equal monthly payments of £—— each such payment to be made on the last day in each month the first payment to be made on the 31st day of October 19— and the last payment to be made in advance on the last day of the calendar month which shall be at least 30 days before the determination of the tenancy together with the payment which falls due on that day. Rent.

4. There is reserved and excepted out of this letting to the landlord :— Exceptions:

(a) All timber and other trees and all mines and minerals with free access and power to cut work and carry away the same respectively the tenant nevertheless being paid reasonable compensation for all damage occasioned to him by the exercise of such powers Trees and minerals;

(b) Subject to the provisions of the Ground Game Acts 1880 and 1906 the exclusive right to all game and rabbits and to preserve the same on the premises with liberty to shoot fish hunt course and sport thereon game;

(c) The right for the landlord and all persons authorised by him at all reasonable times with or without horses carriages and other animals and vehicles to enter upon any part of the Farm for all the above purposes and also for the purpose of viewing the state of the holding and the cultivation thereof. right to enter and view.

5. The tenant hereby agrees with the landlord :— Agreements by tenant:

(a) To pay the rent at the times and in the manner aforesaid Rent;

(b) To pay all rates and taxes [and other outgoings] payable in respect of the Farm except land tax tithe redemption annuity and landlord's property tax rates and taxes;

(c) To keep the farmhouse and buildings and all hedges fences and gates and leave the same at the end of the tenancy in good tenantable repair [*or insert any further or other provisions as to repairs as may be desired*] repairs;

(d) To cultivate and manage the Farm in a good and husbandlike manner and according to the rules of good husbandry and not to injure or deteriorate the holding or permit the same to be injured or deteriorated [*insert any other provision as to the cultivation of the holding. These provisions will be enforceable* (*see note* (*b*) *p.* 324)] cultivation;

(e) To preserve all timber and other trees trees;

(f) Not to break up or convert into tillage any part of the permanent grassland (including land laid to grass for which the landlord has provided seeds) whether so described in the Schedule hereto or not without the previous consent in writing of the landlord or his agent. To pay to the landlord the sum of £—— per acre and so on in proportion for any less quantity of such permanent grassland which the tenant shall break up or convert into tillage without such consent such sums to be as and for liquidated damages for the injury caused by such acts not to break up grassland;

(g) To preserve all game wild fowl woodcock snipe and landrail [with their nests and eggs] and all foxes and fish (but subject to the provisions of the Ground Game Acts 1880 and 1906 to do his best to prevent trespass over any part of the farm and to give notice to the to preserve game, etc.;

landlord of any continued acts of trespass and not to allow any footpaths to be made to permit the landlord to take proceedings against any trespassers or poachers in the tenants' name and to lay information and give evidence and sign if required notices to trespassers and others to keep off the farm the tenant being kept indemnified by the landlord against any costs charges and expenses he may incur at the landlord's request in connection with these matters

residence; (h) At all times during the continuance of the tenancy to reside at the farmhouse

not to assign, etc.; (i) Not to assign or underlet or part with the possession of the Farm or any part thereof without the written consent of the landlord or his agent [*If necessary add a provision permitting the underletting of cottages to employees*]

user; (j) To use the Farm for agricultural purposes only

cultivation to date of quitting. (k) To do all cultivations seedings and other things up to the day of quitting as if he were a continuing tenant.

Landlord's agreements: 6. AND THE LANDLORD hereby AGREES with the tenant :—

Quiet enjoyment; (a) To permit the tenant on paying the rent and performing and observing the several agreements by the tenant herein contained peaceably to hold the Farm without any lawful interruption by the landlord or any person deriving title under him

compensation. (b) On the tenant quitting the Farm and having observed and performed the stipulations on his part contained in this Agreement to pay to the tenant subject to and after setting off any sum or sums due to the landlord for rent or otherwise under or by virtue of this Agreement for the matters and things set forth below [*Insert any provisions as to payment to the tenant for growing crops seedings tillages and labour and other matters for which the tenant is to receive payment on quitting*]

(c) [*A provision as to compensation for damage by game may be added*]

7. It is hereby agreed and declared as follows :—

Resumption; (a) That it shall be lawful for the landlord at any time or times upon giving [one] calendar month's notice in writing of his intention so to do under this clause to enter upon and resume possession of and determine the tenancy of any part or parts of the Farm for any purpose not being the use of the land for agriculture allowing to the tenant a proportionate reduction of the rent and making compensation for all crops sown or growing on the land so taken

proviso for re-entry; (b) That if any part of the rent shall be in arrear for 30 days after the same shall become due or if there shall be a breach of any of the agreements by the tenant herein contained or in case the tenant shall be adjudged bankrupt or enter into any composition with his creditors or if the interest of the tenant under this Agreement is taken in execution or if any execution be levied on the tenant's goods or chattels it shall be lawful for the landlord to re-enter immediately upon the Farm or any part thereof in the name of the whole and thereupon the tenancy shall absolutely determine without prejudice to the rights and remedies of the landlord in respect of any breach or non-observance of any of the stipulations herein contained and on the part of the tenant to be performed and observed

(c) The landlord shall be entitled to set off against and deduct from any moneys which may at any time be payable by the landlord to the tenant in respect of the Farm any moneys which may be payable to the landlord by the tenant in respect of the Farm whether such sum so payable by or to the landlord shall be of a liquidated character or not set-off;

(d) The rights of the parties under this Agreement or otherwise in respect of the tenancy shall not depend on or be affected by any custom of the country (*c*) exclusion of custom;

(e) Nothing in this Agreement shall be deemed to constitute a contract of tenancy within the meaning of the Agricultural Holdings Act 1923 or any statutory re-enactment or modification thereof exclusion of Agri. H. Act;

(f) [*Add a provision as to the removal of fixtures by the tenant as for instance*] The tenant shall have the same right to remove fixtures affixed to the holding by him as are conferred on a tenant under a contract of tenancy within the Agricultural Holdings Act 1923 by section 22 of the said Act save that if the tenant shall not within 3 calendar months after the termination of the tenancy have removed from the Farm any such fixture or fixtures which the landlord has not given notice of his intention to purchase such fixture or fixtures shall immediately upon the expiration of that period become the property of the landlord without payment. fixtures.

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

[*Description of the Farm with reference to a plan if advisable.*]

Form 3.

Assent by the Personal Representatives of the Presumed Survivor of Commorientes who were Entitled as Joint Tenants (*a*).

THIS ASSENT is made the —— day of —— 19— BETWEEN A of *etc.* and B of *etc.* (hereinafter called the Executors) of the one part and C of *etc.* (hereinafter called the Owner) of the other part Parties.

WHEREAS :— Recitals:

(1) By a conveyance dated *etc.* and made between X of the one part and Y and Z of the other part the property hereinafter described was conveyed to the said Y and Z in fee simple subject to the stipulations conveyance to joint tenants;

(*c*) It is advisable to exclude the custom of the country as the parties frequently misunderstand what is included in the custom, and the customs of large estates are frequently mistaken for the custom of the country. It will consequently be necessary to include in the provisions for compensation to the tenant on quitting all compensation which is payable under such custom and is not intended to be excluded.

(*a*) This and the following Precedents of Assents were drafted by Mr. E. H. Bodkin, of Lincoln's Inn. Since the decision of the House of Lords in *Hickman* v. *Peacey*, [1945] A. C. 304, the executors will be safe in acting on the statutory presumption where there is, and is not likely to be, any direct evidence as to the survivorship of either joint tenant. A purchaser from the owner would probably, however, in the absence of a condition precluding inquiry, require a statutory declaration to be made as to the circumstances. This will necessarily be so if the deceased did not perish in the same disaster, but one of them died at an uncertain date abroad—a case which is also covered by the section. Such declaration will, however, be at the purchaser's expense. He will, it is thought, be entitled also to evidence that the joint tenancy was not severed in the lifetime of the joint tenants.

contained in a conveyance dated *etc.* UPON TRUST to sell the same with power to postpone sale and to stand possessed of the net proceeds of sale and the net rents and profits until sale IN TRUST for the said Y and Z as joint tenants

will of survivor; (2) By his will dated the —— day of —— 19— the said Z appointed the Executors to be the executors thereof

death of grantees; (3) The said Y and Z died on the —— day of —— 19— in circumstances rendering it uncertain which of them survived the other and accordingly under section 184 of the Law of Property Act 1925 the said Z (who was the younger) is for the purpose of the devolution of the said property to be deemed to have survived the said Y

probate; (4) The said will of the said Z (who had not previously to his death revoked or altered the same) was on the —— day of —— 19— duly proved by the Executors in the —— Probate Registry

payment of duties. (5) Arrangements have been made for discharging the death duties which became payable by reason of the deaths of the said Y and Z in respect of the said property and the Owner has requested the Executors to vest the legal estate in the same property in him.

NOW IT IS HEREBY DECLARED as follows :—

Assent. 1. The Executors AS PERSONAL REPRESENTATIVES of the said Z deceased hereby assent to the vesting in the Owner of ALL THAT *etc.* for an estate in fee simple subject to the statutory charge for securing the said death duties and to the observance of the said stipulations so far as the same are subsisting and capable of being enforced.

Declaration of no previous assent. 2. The Executors hereby declare that they have not made or executed any previous assent or conveyance in respect of the legal estate in the property the subject of this Assent or any part thereof.

Indemnity. 3. The Owner hereby covenants with the Executors (but by way of indemnity only) that the Owner or the persons deriving title under him will as from the death of the said Z observe the said stipulations and will keep the Executors and each of them and their respective estates and effects and the estate and effects of the said Z effectually indemnified against all proceedings costs claims and demands arising from the breach of the same stipulations or any of them.

Acknowledgment of right to production of probate. 4. The Executors hereby acknowledge the right of the Owner to production of the probate of the said will of the said Z so granted to them as aforesaid and possession whereof is retained by them and to delivery of copies thereof.

AS WITNESS *etc.*

Form 4.

Assent by the Personal Representatives of a Tenant for Life in Themselves as Trustees of the Settlement, the Land being held in Undivided Shares.

Assent. 1. WE A of *etc.* and B of *etc.* AS PERSONAL REPRESENTATIVES of X late of *etc.* deceased who died on the —— day of —— 19— being at his death estate owner in respect of the fee simple in the property hereinafter described and probate of whose last will was duly granted to us by the —— Probate Registry on the —— day of —— 19— hereby assent to the vesting in ourselves of ALL THAT *etc.* [the parcels

may be by reference to the vesting deed] for an estate in fee simple UPON TRUST to sell the same with power to postpone the sale of the whole or any part thereof and to stand possessed of the net proceeds of sale after payment of costs and of the net rents and profits until sale after payment of rates taxes costs of insurance repairs and other outgoings UPON SUCH TRUSTS and subject to such powers and provisions as may be requisite for giving effect to the rights of the persons interested in the same under and by virtue of a trust instrument dated *etc.* or otherwise from time to time.

2. The following additional powers are by virtue of section 28 of the Law of Property Act 1925 (as amended) exercisable by the trustees for the time being of this Assent namely—[*here set out the powers*]. Additional powers.

3. E and F during their joint lives and the survivor during his or her life have power to appoint new trustees of this Assent. Power to appoint trustees.

4. [*Declaration of no previous assent.*]

AS WITNESS *etc.*

Form 5.

Assent to the Vesting of Land subject to a Mortgage in Four out of Five or more Tenants in Common.

AN ASSENT made the —— day of —— 19— BETWEEN A of *etc.* and B of *etc.* (hereinafter called the Executors) of the first part C of *etc.* D of *etc.* E of *etc.* and F of *etc.* (hereinafter collectively referred to as the Trustees) of the second part and the Trustees and G of *etc.* of the third part Parties.

WHEREBY it is agreed and declared as follows :—

1. The Executors as PERSONAL REPRESENTATIVES of X late of *etc.* deceased who died on the —— day of —— 19— being at his death the estate owner in respect of the fee simple of the property hereinafter described for his own use and benefit absolutely and whose last will was duly proved by the Executors in the —— Probate Registry on the —— day of —— 19— hereby assent to the vesting in the Trustees of ALL THAT *etc.* as joint tenants in fee simple subject to a mortgage dated *etc.* and the principal sum of £—— now owing on the security thereof and the interest now due and to accrue due thereon. Assent.

2. The Trustees shall stand possessed of the premises UPON TRUST at their discretion to sell the same or any part thereof with power to postpone such sale and shall stand possessed of the net proceeds of sale (after payment of costs) and of the net rents and profits of such part thereof as shall remain for the time being unconverted (after payment of rates taxes costs of insurance repairs and other outgoings) UPON THE TRUSTS upon which the same ought to be held under and by virtue of the said will of the said X or otherwise from time to time. Trust for sale.

3. [*Declaration of no previous assent.*]

4. The statutory power of appointment of new trustees is applicable to this Assent. Power to appoint trustees.

5. The Trustees and the said G hereby jointly and severally covenant with the Executors that they the Trustees and the said G if and when payment of the said principal sum secured by the said mortgage and the interest now due and to accrue due thereon is lawfully Indemnity.

demanded pay the same to the said —— [the mortgagee] or the persons deriving title under him and will keep the Executors effectually indemnified against the same and every part thereof and all actions proceedings costs charges claims and demands in respect thereof.

6. [*Acknowledgment of right to production of probate.*]

AS WITNESS *etc.*

Form 6.

Assent to the Vesting of Leaseholds in Tenants in Common where Additional Powers are Conferred (*b*).

Parties. THIS ASSENT is made the —— day of —— 19— BETWEEN A of *etc.* and B of *etc.* (hereinafter called the Executors) of the one part and C of *etc.* and D of *etc.* (hereinafter called the Owners) of the other part

Recitals: WHEREAS :—

will; (1) X late of *etc.* (hereinafter called the Testator) being at his death estate owner of the premises short particulars whereof are contained in the Schedule hereto for the residue of the term of —— years from the —— day of —— granted by a lease dated *etc.* duly made his will dated *etc.* and thereby appointed the Executors to be executors thereof

death; probate; (2) The Testator died on the —— day of —— 19— without having revoked or altered his said will which was on the —— day of —— 19— duly proved by the Executors in the —— Probate Registry

payment of duties. (3) All duties which became payable on the Testator's death in respect of the said property have been discharged and the Executors have at the request of the Owners agreed to assent to the vesting of the legal estate in them in manner hereinafter appearing.

NOW IT IS HEREBY DECLARED as follows :—

Assent. 1. The Executors AS PERSONAL REPRESENTATIVES of the Testator hereby assent to the vesting in the Owners of ALL AND SINGULAR the premises comprised in and demised by the said Lease and more particularly described in the said Schedule hereto annexed for the residue of the said term of —— years created by the said Lease subject to the payment of the rent thereby reserved and to the performance and observance of the covenants on the part of the lessee and the conditions therein reserved and contained.

Trust for sale. 2. The Owners shall stand possessed of the premises UPON TRUST to sell the same or any part thereof with power to postpone such sale and to hold the net proceeds of any such sale (after payment of costs) and of the net rents and profits of such part thereof as shall remain for the time being unsold (after payment of all outgoings) IN TRUST for themselves as tenants in common in equal shares.

(*b*) This is one of the cases where the equitable interests must be disclosed, as the powers can only be conferred by beneficiaries absolutely entitled. A purchaser will not, however, be concerned with them for any other purpose. Where there are more than four tenants in common, the others must be made parties to concur in granting the powers or a separate deed executed for this purpose. It may be desirable to give the additional powers when the Assent is made; any transactions could, of course, be carried out by disclosing the equitable interests, but these may devolve or be dealt with. On the other hand it may not be desired to give the trustees for the time being such wide powers.

3. DURING the life of the survivor of the issue now living of His late Majesty King George V and twenty-one years after the death of such survivor the Owners or other the Trustees for the time being of this Assent shall by way of extension of the powers conferred on them by statute have the same full and unrestricted power of dealing with the property the subject of this Assent and any capital money arising under the present or any other power or in any other manner and of effecting any transaction whatsoever (whether such as is mentioned in section 64 of the Settled Land Act 1925 or not) in relation thereto as if they were absolute owners thereof and it is hereby declared that the statutory protection of purchasers shall apply to any person dealing with the Owners or other the Trustees hereof (whether for value or not). Additional powers.

3. [*Declaration of no previous assent.*]

4. [*Power to appoint new trustees.*]

5. The Owners hereby covenant with the Executors that the Owners or the persons deriving title under them will as from the death of the Testator duly pay all rent due under the said Lease and observe and perform all the covenants agreements and conditions therein contained and on the part of the lessee to be observed and performed AND also will as from the date aforesaid save harmless and keep indemnified the Executors and their estates and effects from and against all proceedings costs claims and expenses on account of any omission to pay the said rent or any breach of the said covenants agreements and conditions. Indemnity.

6. [*Acknowledgment of right to production of Probate.*]

AS WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

[*This will contain short particulars of the property.*]

Form 7.

Assent by Personal Representatives to the Vesting in Themselves of Freeholds Devised in Undivided Shares (*c*).

1. WE A of *etc.* and B of *etc.* AS PERSONAL REPRESENTATIVES of X late of *etc.* deceased who died on the —— day of —— 19— being at his death estate owner in respect of the fee simple in the property hereinafter described for his own use and benefit absolutely and whose last will was duly proved by us as the executors therein named on the —— day of —— 19— in the —— Probate Registry hereby assent to the vesting in ourselves as trustees of the same will of ALL THAT *etc.* in fee simple UPON THE STATUTORY TRUSTS applicable thereto by reason of the same having been devised by the said will in undivided shares. Will.

2. [*Declaration of no previous assent.*]

AS WITNESS *etc.*

(*c*) In the case of small properties there seems no objection to bringing the will on the title, and in any case it is submitted that a purchaser must accept the statement that the statutory trusts have arisen and will not be concerned with the devise or the trusts of the proceeds of sale. The advantage of this form of Assent is that new trustees of the will for general purposes and for the purpose of the statutory trusts can in future be made by one instrument. If the Assent creates a new trust for sale (for which Form No. 9 in the Fifth Schedule to the Law of Property Act, 1925, appears to be authority) separate appointments in regard to the Assent and the will, which in effect declares the trusts of the proceeds of sale, are necessary.

Form 8.

Assent to the Vesting of Registered Land in Tenants in Common.

H.M. Land Registry.

Land Registration Act 1925.

District ——

Title No. ——

Property ——

[Date] 1. We A of *etc.* and B of *etc.* as personal representatives of X late of *etc.* hereby assent to the vesting in C of *etc.* and D of *etc.* of the land comprised in the title above referred to And we hereby apply for the entry of the following restriction :—

Except under an order of the Registrar no disposition is to be registered unless authorised by section 28 of the Law of Property Act 1925 or section 16 of the Trustee Act 1925 and (except where the sole proprietor is a trust corporation) no disposition under which capital money arises is to be registered unless the money is paid to at least two proprietors.

2. [*Declaration of no previous assent.*]

3. [*Acknowledgment for production of probate.*]

Signed etc.

Form 9.

Assent to the Vesting of Freeholds in the Administrator of a Deceased Beneficiary.

Parties. This Assent is made the —— day of —— 19— between A of *etc.* and B of *etc.* (hereinafter called the Executors) of the one part and C of *etc.* (hereinafter called the Administrator) of the other part

Recitals: Whereas :—

will. (1) X late of *etc.* (hereinafter called the Testator) being at the date of his death estate owner in respect of the fee simple in the property hereinafter described for his own use and benefit absolutely died on the —— day of —— 19— having by his last will dated the —— day of —— 19— appointed the Executors to be the executors thereof who duly proved the same on the —— day of —— 19— in the —— Probate Registry

death of intestate; (2) Y late of *etc.* having at the date of his death become entitled to require the Executors (subject to their rights and powers for the purposes of administration) to vest the legal estate in the said property in him beneficially died on the —— day of —— 19— intestate and letters of administration to his estate were on the —— day of —— 19— granted out of the —— Probate Registry to the Administrator

payment of duties. (3) All duties which became payable on the death of the Testator in respect of the said property and all claims enforceable against the same of which the Executors (after making proper statutory advertisements for claims) have notice have been discharged or provided for and the Executors have at the request of the Administrator agreed to vest

the legal estate in the same property in him in manner hereinafter appearing.

NOW IT IS HEREBY DECLARED as follows :—

1. The Executors as PERSONAL REPRESENTATIVES of the Testator hereby assent to the vesting in the Administrator of ALL THAT *etc.* for an estate in fee simple. Assent.

2. The Administrator shall stand possessed of the property the subject of this Assent UPON TRUST to sell the same with power to postpone such sale for such a period as the Administrator without being liable to account may think proper and to hold the net proceeds of sale (after payment of costs) and of the rents and profits until sale as part of the estate of the said Y. Trust for sale.

3. [*Declaration of no previous assent.*]

4. [*Acknowledgment of right to production of probate.*]

AS WITNESS *etc.*

Form 10.

Assent to the Vesting of Freeholds in the Trustees of a Charity (*d*).

1. WE A of *etc.* and B of *etc.* AS PERSONAL REPRESENTATIVES of X late of *etc.* deceased who died on the —— day of —— 19— being at his death estate owner in respect of the fee simple in the property hereinafter described for his own use and benefit absolutely and whose last will was duly proved by us as the Executors therein named in the —— Probate Registry on the —— day of —— 19— hereby assent to the vesting in C of *etc.* D of *etc.* and E of *etc.* (hereinafter called the Trustees) of ALL THAT *etc.* for an estate in fee simple. Assent.

2. The Trustees shall stand possessed of the property the subject of this Assent UPON THE TRUSTS (being charitable trusts within the meaning of section 29 of the Settled Land Act 1925) and with and subject to the powers and provisions declared and contained in a declaration of trust dated *etc.* [or applicable thereto as part of the property of a charitable organisation known as ——.] Declaration of trust.

3. [*Declaration of no previous assent.*]

4. [*Acknowledgment of right to production of probate.*]

AS WITNESS *etc.*

(*d*) The Assent or the will must be sent to the Charity Commissioners or, in the case of educational trusts, the Board of Education, for recording: Settled Land Act, 1925, s. 29 (4); Education Act, 1944, s. 87. Perhaps in the latter case it is safer for both to be recorded. Even if the charity is a "mixed" charity or one wholly supported by voluntary contributions a purchaser will usually be bound and entitled to satisfy himself whether the consent of the Charity Commissioners to a sale is required, and for this purpose to inquire into the constitution of the charity. If, however, as is sometimes the case with mixed charities, the trust deed provides that land is to be conveyed on trust for sale, it seems that all reference to the charitable trusts may be omitted, notwithstanding the last paragraph of s. 29 (1) of the Settled Land Act, 1925, and the ordinary form of Assent in favour of trustees for sale adopted. Under s. 5 of the Mortmain and Charitable Uses Act, 1891, the land will have to be sold within a year of the testator's death unless the Charity Commissioners or the Court are satisfied that it is required for actual occupation. After the end of the year an assent in favour of the trustees cannot be made without such an order, though until assent the Court can still extend the time: see *Re Gorham's Charity*, [1939] Ch. 410.

Form 11.

Will of a Testator whose Estate principally consists of Shares in a Private Company, Settling the Shares on his Wife and Children, with Provisions for the Wife and Children becoming Directors of the Company.

I A of *etc.* Governing Director of X Limited DECLARE this to be my last will

Revocation of earlier wills.

1. I hereby revoke all other wills and testamentary dispositions heretofore made by me.

Appointment of executors.

2. I appoint B of *etc.* and C of *etc.* (hereinafter called "my Trustees") to be executors and trustees of this my will and I appoint them to be the guardians of my infant children to act jointly with my wife during her life and also after her death jointly with any guardian or guardians (if any) who may have been appointed by her.

Legacy to wife.

3. I give to my wife the sum of £—— immediately after my death free of duty for her immediate requirements and in priority to all other bequests hereby made.

Bequest of chattels.

4. I give to my wife absolutely free of duty all articles and effects of personal domestic or household use ornament or consumption belonging to me.

Bequest of shares.

5. I bequeath to my Trustees free of duty the —— preference shares and —— ordinary shares of X Ltd. (hereinafter called "the company") which I now possess and all other shares (if any) in the company which I may possess at my death upon the following trusts that is to say:—

Trust for wife.

(i) My Trustees shall stand possessed of —— of the said preference shares and of —— of the said ordinary shares upon trust to pay the dividends and income arising therefrom to my said wife during her life [and widowhood]

Trust for children.

(ii) My Trustees shall stand possessed of my remaining shares in the company and of the said —— preference shares and —— ordinary shares subject to the life interest of my wife therein upon trust for such of my sons E and F and my other children (if any) who attain the age of twenty-five years if more than one as tenants in common in equal shares absolutely

Trust for issue.

(iii) If any child of mine dies in my lifetime or after my death before attaining the age of twenty-five years leaving a child or children who shall attain the age of twenty-one years or marry under that age such child or children shall take by substitution if more than one in equal shares the shares in the company which such deceased child of mine would have taken under the trusts hereinbefore contained if he or she had survived me and attained a vested interest

Power to transfer qualification shares to a trustee.

(iv) My Trustees may at any time or times with a view to qualifying one or more of my Trustees to act as a director or directors of the company transfer to any one or more of the Trustees of this my will such a number of shares in the company as may be necessary to qualify such trustee to act as director of the company and any shares so transferred shall be held by such trustee upon the trusts of this clause and on such trustee ceasing to act as director of the company the shares so transferred to him shall be forthwith retransferred to my Trustees AND I HEREBY DECLARE that any trustee of my will who

shall act as director of the company may be paid and retain any fees paid to him by the company as such director (*a*)

(v) If at any time or times my Trustees in their unfettered discretion shall think it in the interests of my estate that my said wife or my said sons E and F or all or any of them shall act as director or directors of the company my Trustees may transfer —— ordinary shares of the company or such other number of shares as may for the time being be necessary to qualify them or any of them to act as directors to my said wife or to my said sons or any of them and upon such transfer the shares so transferred shall vest in my said wife or sons absolutely free from the trusts hereof but so that in the case of my said sons any shares so transferred shall be brought into account on the ultimate division of the said shares

Power to transfer shares to wife or to sons.

(vi) If during my life the company be reconstructed or the business of the company be sold to any other company or the business of the company be amalgamated with the business of any other company any shares held by me at my death in any other company by reason of such reconstruction sale or amalgamation as aforesaid shall be held by my Trustees upon the trusts and subject to the powers and provisions of this clause including the powers conferred by sub-clauses (iv) and (v) hereof

(vii) I declare that it is my wish that my Trustees shall retain my shares in the company with a view to their ultimate transfer to my children or their issue but if at any time or times in the unfettered discretion of my Trustees they consider that a sale of my said shares or any part thereof would be in the best interests of my family I authorise my Trustees from time to time to sell my said shares or any part thereof PROVIDED ALWAYS that no such sale shall be made during the lifetime of my wife without her consent in writing being previously obtained and after her death without the consent in writing of such of my children as shall for the time being be over the age of twenty-one years and I direct that the proceeds of sale of any such shares be invested in any investments for the time being authorised for the investment of trust funds and I FURTHER DECLARE that on any such sale it shall be lawful for my Trustees to sell such shares or any part thereof to any child of mine at a price to be fixed by my Trustees and notwithstanding that such child at the time of such sale may be a trustee of this my will.

Desire that shares be retained.

6. I devise and bequeath all the real and personal property whatsoever and wheresoever of or to which I shall be possessed or entitled at my death or over which I shall then have a general power of appointment or disposition by will unto my Trustees upon trust that my Trustees shall sell call in and collect and convert into money the said real and personal property at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession unless it shall appear to my Trustees that an earlier sale would be beneficial) with power to postpone the sale calling in and conversion of the whole or any part or parts of such property during such period as they shall think proper and to retain the same

Residuary gift.

(*a*) An express power to retain directors' fees is necessary, as otherwise the directors will have to account for the fees to the trust estate: *Re Macadam* (1943), 62 T. L. R. 48.

in its actual state of investment without being responsible for loss and I direct that the income of such of the premises as for the time being shall remain unsold shall as well during the first year after my death as afterwards be applied as if the same were income arising from investments thereinafter directed to be made of the proceeds of sale thereof and that no reversionary or other property not actually producing income shall be treated as producing income for the purposes of this my will.

Payment of debts.

7. My Trustees shall out of the moneys to arise from such sale calling in and conversion of my said real and personal property and my ready money pay my funeral and testamentary expenses and debts and the legacies given by this my will or any codicil hereto and all death duties and other moneys which under or by virtue of any direction or bequest (free of duty in this my will or any codicil hereto) are payable out of my general personal estate and my Trustees shall at their discretion invest the residue of such moneys in or upon any investments for the time being authorised by law for the investment of trust funds.

Trusts of residue.

8. My Trustees shall stand possessed of the residue of the said moneys and investments for the time being representing the same and of such part of my estate as shall for the time being remain unsold and unconverted (all of which premises are hereinafter called "the trust fund") upon the following trusts that is to say:—

(1) My Trustees shall pay the income of the trust fund to my wife during her life

(2) After the death of my wife my Trustees shall hold the capital and future income of the trust fund upon the trusts declared in respect of the shares of the company settled by clause 5 hereof in favour of my children and their issue.

Power to appoint new trustees.

9. The power of appointing a new trustee or new trustees of this my will shall be vested in my wife during her life.

Power to trustees to charge.

10. Any executor or trustee for the time being hereunder being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid (free of duty and in priority to all other dispositions contained in this my will or any codicil hereto) all usual professional or other charges for business done by him or his firm in the premises whether in the ordinary course of his profession or business or not and although not of a nature requiring the employment of a solicitor or other professional person.

IN WITNESS *etc.*

Form 12.

Voluntary Settlement in favour of the Children (Present and Future) of the Settlor, Tying up their Respective Shares (*a*).

(*Drafted by A. H. Withers, of Lincoln's Inn.*)

THIS SETTLEMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Settlor") of the one part and B of *etc.* and C of *etc.* (hereinafter called "the Original Trustees") of the other part. Parties.

WHEREAS the Settlor being absolutely entitled to the moneys and investments specified in the schedule hereto and being desirous of settling the same in manner hereinafter appearing has paid or transferred or is about to pay or transfer the same to the Original Trustees to the intent that the same shall be held on the trusts hereinafter declared Recitals: transfer of investments;

AND WHEREAS the Settlor has been married once only namely on the —— day of —— to D and has — children and no more namely E and F who were born on the —— day of —— and the —— day of —— respectively. settlor's family;

NOW THIS SETTLEMENT WITNESSETH and it is hereby agreed and declared as follows:— witnesseth.

1. THIS settlement is irrevocable and is made in accordance with the aforesaid desire of the Settlor and in consideration of the natural love and affection of the Settlor for his children now living and for divers other good causes and considerations.

2. IN this settlement the following expressions have the following meanings namely:— Definitions:

(A) "The Trustees" means the Original Trustees or the [survivors or] survivor of them or other the trustees or trustee for the time being of this settlement and (notwithstanding any context) a sole trustee may act for all the purposes of this settlement "trustees";

(B) "The Trust Property" means and includes (1) the moneys and investments specified in the schedule hereto (2) all moneys added to the capital of the entirety of the trust property under the express provision for accumulation [during the life of the Settlor] hereinafter contained (3) all moneys and investments paid or transferred to and accepted by the trustees as additions to the trust property and (4) the investments and property from time to time representing the same moneys investments accumulations and additions or any part or parts thereof respectively "trust property";

(*a*) Stamp *ad valorem*. This settlement is intended to meet the case of a parent who desires to make provision for his children and issue and at the same time to save so far as possible income tax, surtax and death duties. The provisions of such a settlement must in part depend on the age of the settlor and the age of his children at the date of the settlement. In view of the provisions of the Finance Act, 1936, s. 21, it is not possible to save income tax in respect of income paid to or for the benefit of a child, if at the commencement of the year of assessment the child was an infant and unmarried. Further, where, when the settlement is made, the settlor has only one or two children of very tender age, the possibility has to be faced that they may die in infancy, and in this case provision must be made for the application of income during any period when no child may be alive to take it, for if there is any possibility of a resulting trust to the settlor, whether of income or capital, the settlement will be caught by the provisions of the Finance Act, 1946, s. 28, and the income be deemed to be the income of the settlor for surtax purposes.

"settlor's children";

(C) "The Settlor's Children" means all the children of the Settlor (whether now living or hereafter born and whether or not by his present marriage) [except (*b*) every child of the Settlor who shall be born after the date on which the first of the children of the Settlor to attain the age of twenty-one years attains that age]

"appointed day".

(D) "The Appointed Day" means the day on which expires the period of twenty-one years calculated from and after the death of the last survivor of such of the following persons (*c*) as have been born before and are living at the date of this settlement namely the Settlor and his present wife and his present children the said E and F and the descendants of His Late Majesty King George the Fifth.

Trusts during settlor's lifetime.

3. The income of the trust property accruing during the life of the Settlor shall be dealt with as follows:—

(A) Such income shall for the purposes hereinafter appearing be allocated to (and if more than one equally between) such of the Settlor's children as (having then been born) shall from time to time be living (*d*)

Definition of children living during the life of the settlor.

Provided always that for the purpose of the foregoing provision a child of the Settlor dying in his lifetime shall (a) be deemed to be living so long as any child of such child is alive and (b) be deemed to continue to live during the whole of the life of the Settlor if any child of such deceased child of the Settlor shall during the life of the Settlor attain the age of twenty-one years or marry under that age

Trusts of income.

(B) The income hereinbefore directed to be allocated to any child of the Settlor shall be held on the trusts and with and subject to the powers and provisions which would have been applicable thereto if the Settlor were dead and such income were income of property hereinafter directed to be settled upon such child

Provision for accumulation.

(C) Subject to the foregoing provision so far as it may take effect the income of the trust property accruing during the life of the Settlor shall be accumulated and added to the capital of the entirety of the trust property (*e*).

Definition of "surviving children".

4. (A) In this clause the expression "the surviving children" (*f*) means such of the Settlor's children as shall (1) be living at or born after the death of the Settlor or (2) have predeceased the Settlor either (a) leaving or having issue living at or born after the Settlor's death or (b) having had a child (then deceased) who being male attained the age of twenty-one years or being female attained that age or married

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(*b*) This provision may be useful when the children are very young at the time when the settlement is made, and it may be desired that, when the first attains twenty-one, the total number of shares into which the fund will be divisible shall be known so that, if it is desired, a child's share of capital may be paid out to it under the power of advancement in clause 5 (B).

(*c*) As the shares of future children are settled, it is desirable to make the date before which all interests must vest as late as is permissible having regard to the rule against perpetuities. Accordingly, it is desirable to choose as many well-known lives as is reasonably practicable. If a provision of this character is not inserted, the powers of children who are born after the date of the settlement may be unduly restricted.

(*d*) This is necessary as it is not possible to say how many of the children of the settlor may be living.

(*e*) Some provision is necessary to provide for the application of income during the life of the settlor in case there is for the time being no issue living to take the income. If this trust for accumulation is inserted, however, there can be no further express trust for accumulation having regard to the provisions of s. 164 of the Law of Property Act, 1925. See also note (*i*).

(*f*) This definition does not include a child who dies childless in the lifetime of the settlor leaving a widow.

(B) On the death of the Settlor the capital of the trust property shall (1) (if the number of the surviving children is more than one) be divided into such a number of equal shares as shall be equal to the total number of the surviving children and one of such shares shall be settled upon each one of the surviving children and (2) (if the number of the surviving children is only one) be settled upon that one person who shall be "the surviving children". Division of the capital into shares. Settlement of children's shares.

5. FROM and after the death of the Settlor all property in this deed directed to be settled upon any child of the Settlor shall be held on the trusts (*g*) and with and subject to the powers and provisions following that is to say:—

(A) Such property is in this clause referred to as "the Settled Share" and that child of the Settlor upon whom the Settled Share is directed to be settled is hereinafter in this clause referred to as "the Beneficiary" Definitions: "settled share"; "beneficiary"

(B) The trustees may at any time or times after the death of the Settlor [or in his lifetime with his consent in writing] as to [all or] any part or parts [not exceeding in the whole one quarter free of estate duty] of the Settled Share transfer or raise and pay or appropriate the same to the Beneficiary for his or her own absolute use and benefit or raise and pay or apply the same for the advancement or otherwise for the benefit of the Beneficiary in such manner as the trustees shall think fit (*h*) but this power shall not be exercised after the appointed day and further after the Beneficiary has attained the age of twenty-one years this power shall not be exercised without the consent in writing of the Beneficiary Power of advancement in favour of beneficiaries.

(C) Subject as hereinbefore declared the income of the Settled Share accruing during the life of the Beneficiary shall belong and be paid to the Beneficiary (*i*) Trusts of income.

(D) All appointments made by the Beneficiary under the powers conferred by the next two following paragraphs of this clause can only take effect subject to the following provisions of this paragraph that is to say:— Limitation on powers of appointment.

(1) No such appointment may be made after the appointed day

(2) No revocable appointment may be revoked after the appointed day

(3) An appointment by will only operates if the Beneficiary dies before the appointed day

AND on the preparation of every appointment special regard should be had to the rule against perpetuities

(E) The Beneficiary may [by deed executed prior to and in contemplation of marriage or] by will or codicil appoint that as from the death of the Beneficiary or from any later date the income of Power of appointment in favour of surviving spouse.

(*g*) The wisdom of settling children's shares is questionable, as it makes it difficult or impossible for the children to make practical use of the capital, and on their respective deaths it provides the Revenue with the maximum amount of death duties.

(*h*) It would appear that the effect of s. 43 of the Finance Act, 1940, makes estate duty payable on the beneficiary's death on all property which after the settlor's death is taken out of settlement under this power.

(*i*) As clause 3 (C) provides for accumulations it is not possible to provide for a further period of accumulation during minority. Accordingly, if the beneficiary dies under twenty-one estate duty will be payable: see the Trustee Act, 1925, s. 31; *Stanley* v. *Inland Revenue Commissioners*, [1944] K. B. 255; *Re Jones*, [1946] 2 A. E. R. 281.

[all or] any part or parts not exceeding in all one — part of the Settled Share shall be paid to any person who may be the husband or wife of the Beneficiary at the death of the Beneficiary for the residue of the life of such person or for any less period and subject to any conditions or restrictions the Beneficiary may think fit AND any such appointment may provide that all or any part or parts of the appointed income accruing during all or any part or parts of the life of such surviving husband or wife shall be paid to or held by such trustees for such period or periods on such discretionary trusts for or between such persons (including such husband or wife) as the Beneficiary may think fit to appoint or declare save that (*k*) neither the Settlor nor any woman whom he has married or shall hereafter have married shall be an object of such discretionary trust

Power of appointment in favour of issue.

(F) Subject as hereinbefore declared the Settled Share shall be held IN TRUST for all or any to the exclusion of the others or other of the children and remoter issue of the Beneficiary if more than one in such shares and in such manner in all respects as the Beneficiary shall by deed revocable or irrevocable or by will or codicil appoint AND in default of any and subject to every such appointment IN TRUST for all or any the children or child of the Beneficiary who shall be living on the appointed day or shall before the appointed day being male attain the age of twenty-one years or being female attain that age or marry and if more than one in equal shares PROVIDED ALWAYS that any share appointed to a child or to his or her issue under the foregoing power shall in default of appointment to the contrary be brought into hotchpot by such child in the division of the unappointed part of the Settled Share

Trusts in default of appointment.

Power of advancement in favour of issue.

(G) The trustees may as to any part or parts (not exceeding together one half free of estate duty) of the presumptive or vested share of any person (being a descendant of the Beneficiary) in the Settled Share transfer or raise and pay or appropriate the same to such person for his or her own absolute use and benefit or raise and pay or apply the same for or towards the education or advancement or otherwise for the benefit of such person in such manner as the trustees may think fit but this power shall not be exercised after the appointed day or to the prejudice of any prior trust existing or appointed under any of the trusts or powers hereinbefore in this settlement contained without the consent of the person for the whole or part of whose life such trust shall or may take effect

Accruer provision.

(H) Subject as hereinbefore declared the Settled Share shall fall back into the trust property (*l*) and be held on the same trusts and with and subject to the same powers and provisions as would have been applicable thereto if the Beneficiary had died in the lifetime of the Settlor without ever having been married.

Ultimate trust.

6. SUBJECT (*m*) to the trusts powers and provisions hereinbefore declared and contained the trust property and the income thereof as from the date hereof shall be held in trust for X.

(*k*) This is necessary to prevent a claim for estate duty on the ground that an interest has been reserved to the settlor and to avoid a claim for surtax under s. 38 (2) (a) of the Finance Act, 1938.

(*l*) See clause 4 (B).

(*m*) In view of the provisions of the Finance Act, 1946, s. 28, an ultimate trust should not be reserved in favour of the settlor.

Investment clauses.

7. ANY moneys requiring investment (*n*) hereunder may be invested in the names [or under the legal control] of the trustees in any manner hereinafter mentioned that is to say :—

(i) In any of the public stocks or funds or government securities of the United Kingdom [or] [but not in] India or any foreign country or any British colony (which expression in this clause does not include the Irish Free State but with this exception includes any state dependency dominion or commonwealth) or any province or constituent part of any such colony

(ii) Upon the security of freehold copyhold leasehold or chattel real property in England or Wales or Ireland or of real or leasehold property in Scotland [or India] or any British colony or any foreign country

(iii) In the purchase of land in England being either freehold or held for a term of which not less than fifty years shall be unexpired at the date of purchase all lands so purchased to be held by the trustees upon trust to sell the same with full power to postpone conversion

(iv) In or upon the stocks funds shares debentures mortgages or securities of any corporation body or company municipal county local commercial or of any other description in the United Kingdom [or] [but not in] India or any British colony or any foreign country or

(v) Upon the security of any interest for a life or lives or determinable on a life or lives or any other event in real or personal immovable or movable property wheresoever situate or arising together with a policy or policies of assurance on such life or lives or against such event

[PROVIDED ALWAYS that no money (*o*) shall be invested under any of the provisions of this clause in any stocks funds bonds shares or securities to bearer or transferable by mere delivery or delivery and endorsement though coming within the general description of investments hereinbefore authorised] AND the Trustees shall have full power to vary or transpose any investments into or for any other or others of any nature hereinbefore authorised and to vary the terms of property comprised in any security and also power (before the appointed day) to apply any money in the erection alteration improvement or structural repair of any buildings on any land held on the same trusts as the moneys applied thereon under this power.

Power of appointing new trustees.

8. THE power of appointing a new trustee or new trustees of these presents shall be vested in the Settlor during his life.

Trustee charging clause.

9. ANY trustee for the time being hereunder being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or other charges for business done by him or his firm in the premises whether in the ordinary

(*n*) It is advisable to insert a wide power of investment. Having regard to the present low yield of trustee investments, if the trust income is to be maintained and the capital reasonably secured the discretion given to the trustees should be as wide as possible.

(*o*) The Exchange Control Bill at present before Parliament makes the deposit of bearer stock in an " authorised depository " compulsory and prohibits its withdrawal. If these provisions become law, bearer securities will become as safe as, if not safer than, ordinary registered investments and the restriction on the holding of bearer securities by trustees will become unnecessary.

course of his profession or business or not and although not of a nature requiring the employment of a solicitor or other professional person.

In witness *etc.*

The Schedule.

[*To contain particulars of the moneys and investments settled.*]

Form 13.

Voluntary Settlement in favour of the Children (Present and Future) of a Living Person (other than the Settlor) Tying up their Respective Shares (*a*).

(*Drafted by A. H. Withers, of Lincoln's Inn.*)

Parties. This Settlement is made the —— day of —— 19— between A of *etc.* (hereinafter called "the Settlor") of the one part and B of *etc.* and C of *etc.* (hereinafter called "the Original Trustees") of the other part.

Recitals: transfer of investments; Whereas the Settlor being absolutely entitled to the moneys and investments specified in the schedule hereto and being desirous of settling the same in manner hereinafter appearing has paid or transferred or is about to pay or transfer the same to the Original Trustees to the intent that the same shall be held on the trusts hereinafter declared

And whereas D of *etc.* is a —— (*b*) of the Settlor and is hereinafter referred to as "the Parent"

relationship of beneficiaries to settlor; And whereas the Parent has been married once only namely on the —— day of —— and has — children and no more namely E who was born on the —— day of —— and F who was born on the —— day of ——.

witnesseth. Now this Settlement witnesseth and it is hereby agreed and declared as follows:—

1. This Settlement is irrevocable and is made in accordance with the aforesaid desire of the Settlor and in consideration of the natural love and affection of the Settlor for the Parent and the children of the Parent and for divers other good causes and considerations.

Definitions: 2. In this Settlement the following expressions have the following meanings namely:—

"trustees"; (A) "The Trustees" means the Original Trustees or the [survivors or] survivor of them or other the trustees or trustee for the time being of this Settlement and (notwithstanding any context) a sole trustee may act for all the purposes of this settlement

(*a*) Stamp *ad valorem*. This precedent follows the lines of the preceding precedent. As the settlor is not the parent of the children for whom provision is made, the provisions under which settlement income is deemed to be the settlor's income which apply in the case of children, will present no difficulty here.

(*b*) The relationship of the beneficiaries to the settlor should be stated for succession duty purposes. If the beneficiaries are not related to the settlor this should be stated. Further, it must be remembered that, if the parent is in the employment of the settlor, so long as such employment continues the income of the settled property will be deemed to be the income of the settlor for surtax purposes under the Finance Act, 1946, s. 28 (1).

(B) "The Trust Property" (*c*) means and includes (1) the moneys and investments specified in the schedule hereto (2) all moneys and investments paid or transferred to and accepted by the trustees as additions to the trust property and (3) the investments and property from time to time representing the same moneys investments and additions or any part or parts thereof respectively "trust property";

(C) "The Parent's children" means all the children of the Parent (whether now living or hereafter born and whether or not by his present marriage) [except every child (*d*) of the Parent who shall be born after the date on which the first of the children of the Parent to attain the age of twenty-one years attains that age] "parent's children";

(D) "The appointed day" means the day on which expires the period of twenty-one years calculated from and after the death of the last survivor of such of the following persons (*e*) as have been born before and are living at the date of this Settlement namely the Parent and his present wife and his present children the said E and F and the Settlor and the descendants of His Late Majesty King George the Fifth. "appointed day".

3. THE income of the trust property accruing during the life of the Parent shall be dealt with as follows:— Trusts of income during parents' life.

(A) Such income shall for the purposes hereinafter appearing be allocated to (and if more than one equally between) such of the Parent's children as having then been born shall from time to time be living (*f*) PROVIDED ALWAYS that for the purpose of the foregoing provision a child of the Parent dying in his lifetime shall (a) be deemed to be living so long as any child of such child is alive and (b) be deemed to continue to live during the whole of the life of the Parent if any child of such deceased child of the Parent shall during the life of the Parent attain the age of twenty-one years or marry under that age

(B) The income hereinbefore directed to be allocated to any child of the Parent shall be held on the trusts and with and subject to the powers and provisions which would have been applicable thereto if the Parent were dead and such income were income of property hereinafter directed to be settled upon such child Trusts of income.

(C) Subject to the foregoing provisions so far as the same may take effect the income of the trust property accruing during the life of the Parent shall be paid to the Parent for his own use absolutely (*g*). Trust for parent.

4. (A) In this clause the expression "the surviving children" (*h*) means such of the Parent's children as shall (1) be living at or born Meaning of "surviving children".

(*c*) This definition does not include any accumulations of income as this form does not provide for accumulations during any period while there are no children living.

(*d*) See note (*b*), *ante*, p. 338.

(*e*) See note (*c*), *ante*, p. 338.

(*f*) See note (*d*), *ante*, p. 338.

(*g*) This provides for the application of income while the parent has no issue living. If the income was directed to be accumulated such accumulation would cease on the settlor's death, which might give rise to a claim for estate duty on such death. There is no objection to a direction to accumulate for a period of five years from the date of the settlor's death, as should he die within this period estate duty will be payable in any event: see Finance Act, 1946, s. 47. It is further essential to provide for income during such period as there may be no issue of the parent in existence, as otherwise there would be a resulting trust in favour of the settlor with a consequent liability to estate duty. It is accordingly necessary to give any income received while there is no issue in existence to some third person. In most cases the parent of the children for whose benefit the settlement is made will be the appropriate person.

(*h*) See note (*f*), *ante*, p. 338.

after the death of the Parent or (2) have predeceased the Parent either (a) leaving or having issue living at or born after the death of the Parent or (b) having had a child (then deceased) who being male attained the age of twenty-one years or being female attained that age or married

Division of the capital into shares.

(B) On the death of the Parent the capital of the trust property shall (1) (if the number of the surviving children is more than one) be divided into such a number of equal shares as shall be equal to the total number of the surviving children and one of such shares shall be settled upon each one of the surviving children and

(2) (If the number of the surviving children is only one) be settled upon that one person who shall be "the surviving children".

Settlement of children's shares.

5. FROM and after the death of the Parent all property in this deed directed to be settled upon any child of the Parent shall be held on the trusts (*i*) and with and subject to the powers and provisions following that is to say:—

Definitions: "settled share"; "beneficiary".

(A) Such property is in this clause referred to as "the Settled Share" and that child of the Parent upon whom the Settled Share is directed to be settled is hereinafter in this clause referred to as "the Beneficiary"

Power to apply income for infant's maintenance.

(B) So long as the Beneficiary is alive and under the age of twenty-one years the trustees may at their discretion pay all or any part of the income of the Settled Share to the Beneficiary (notwithstanding infancy) for his or her own absolute use and benefit or pay or apply all or any part of such income for or towards the maintenance education or benefit of the Beneficiary in such manner as the trustees may think fit and may either themselves so apply the same or may pay the same to the guardian or guardians of the Beneficiary for the purposes aforesaid without seeing to the application thereof and shall

Trust for accumulation.

accumulate (*k*) the surplus (if any) of such income by investing the same in augmentation of the Settled Share so that such accumulations shall for all purposes be deemed to form part of the Settled Share and shall follow the destination thereof but so long as the Beneficiary is alive and under the age of twenty-one years the trustees may at any time or times if they think fit apply such accumulations or any part thereof as if the same were income of the Settled Share arising in the then current year

Power of advancement in favour of beneficiary.

(C) The trustees may at any time or times after the death of the Parent [or in his lifetime with his consent in writing] as to [all or] any part or parts (not exceeding in the whole one quarter free of estate duty) of the Settled Share transfer or raise and pay or appropriate the same to the Beneficiary for his or her own absolute use and benefit or raise and pay or apply the same for the advancement or otherwise for the benefit of the Beneficiary in such manner as the trustees shall think fit (*l*) but this power shall not be exercised after the appointed day and further after the Beneficiary attains the age of twenty-one years this power shall not be exercised without the consent in writing of the purchaser

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(*i*) See note (*g*), *ante*, p. 339.

(*k*) A trust for accumulation can be inserted here as no trust for accumulation has been inserted earlier in the settlement.

(*l*) See note (*h*), *ante*, p. 339.

(D) Subject as hereinbefore declared the income of the Settled Share accruing during the life of the Beneficiary shall belong and be paid to the Beneficiary

Trusts of income;

(E) All appointments made by the Beneficiary under the powers conferred by the next two following paragraphs of this clause can only take effect subject to the following provisions of this paragraph that is to say :—

Limitations on powers of appointment.

(1) No such appointment may be made after the appointed day

(2) No revocable appointment may be revoked after the appointed day

(3) An appointment by will only operates if the Beneficiary dies before the appointed day

AND on the preparation of every appointment special regard should be had to the rule against perpetuities

(F) The Beneficiary may [by deed executed prior to and in contemplation of marriage or] by will or codicil appoint that as from the death of the Beneficiary or from any later date the income of [all or] any part or parts not exceeding in all one — part of the Settled Share shall be paid to any person who may be the husband or wife of the Beneficiary at the death of the Beneficiary for the residue of the life of such person or for any less period and subject to any conditions or restrictions the Beneficiary may think fit AND any such appointment may provide that all or any part or parts of the appointed income accruing during all or any part or parts of the life of such surviving husband or wife shall be paid to or held by such trustees for such period or periods on such discretionary trusts for or between such persons (including such husband or wife) as the Beneficiary may think fit to appoint or declare save that neither the Settlor (*m*) nor any woman whom he has married or shall hereafter have married shall be an object of such discretionary trust

Power of appointment in favour of surviving spouse.

(G) Subject as hereinbefore declared the Settled Share shall be held IN TRUST for all or any to the exclusion of the others or other of the children and remoter issue of the Beneficiary if more than one in such shares and in such manner in all respects as the Beneficiary shall by deed revocable or irrevocable or by will or codicil appoint AND in default of any and subject to every such appointment IN TRUST for all or any the children or child of the Beneficiary who shall be living on the appointed day or shall before the appointed day being male attain the age of twenty-one years or being female attain that age or marry and if more than one in equal shares PROVIDED ALWAYS that any share appointed to a child or to his or her issue under the foregoing power shall in default of appointment to the contrary be brought into hotchpot by such child in the division of the unappointed part of the Settled Share

Power of appointment in favour of issue.

Trusts in default of appointment.

(H) The trustees may as to any part or parts (not exceeding together one half free of estate duty) of the presumptive or vested share of any person (being a descendant of the Beneficiary) in the Settled Share transfer or raise and pay or appropriate the same to such person for his or her own absolute use and benefit or raise and pay or apply the same for or towards the education or advancement or otherwise for

Power of advancement in favour of issue.

(*m*) See note (*k*), *ante*, p. 340.

the benefit of such person in such manner as the trustees may think fit but this power shall not be exercised after the appointed day or to the prejudice of any prior trust existing or appointed under any of the trusts or powers hereinbefore in this settlement contained without the consent of the person for the whole or part of whose life such trust shall or may take effect

Accruer provision.

(I) Subject as hereinbefore declared the Settled Share shall fall back into the trust property and be held on the same trusts and with and subject to the same powers and provisions as would have been applicable thereto if the Beneficiary had died in the lifetime of the Parent without ever having been married.

Ultimate trust.

6. SUBJECT (*n*) to the trusts powers and provisions hereinbefore declared and contained the trust property and the income thereof as from the date hereof shall be held in trust for ——.

7. [*Investment clause* (*o*).]

8. [*Power to appoint trustees* (*p*).]

9. [*Trustee remuneration* (*q*).]

IN WITNESS *etc.*

THE SCHEDULE.

[*Particulars of the moneys and investments settled by the above-written deed.*]

Form 14.

Declaration by a Corporation which has Acquired Land Compulsorily under the Housing (Temporary Accommodation) Act, 1944, and Housing Act, 1936, from an owner who cannot dispose of the land, that the land is vested in the Corporation (*a*).

(*Drafted by Humphrey H. King, of Lincoln's Inn.*)

THIS DEED is made the —— day of —— 19— by the MAYOR ALDERMEN AND BURGESSES of the borough of —— in the County of —— (hereinafter called "the Corporation")

WHEREAS in or about the month of —— 19— under the powers conferred by section 6 of the Housing (Temporary Accommodation) Act 1944 the Corporation with the authority of the Minister of Health entered upon and took possession of the lands described in the First Schedule hereto (hereinafter called "the said lands") for use as a site for structures to be made available under section 1 of the said Act

AND WHEREAS by virtue of sub-section (4) of section 6 of the said Act the Corporation have power to acquire the said lands compulsorily as if they had been authorised so to do by an order under section 74 of the Housing Act 1936 made submitted and confirmed in accordance with the provisions of the First Schedule to the Housing Act 1936

(*n*) In view of the provisions of s. 28 of the Finance Act, 1946, it is undesirable that the ultimate trust should be in favour of the settlor.

(*o*) See *ante*, p. 341.

(*p*) See *ante*, p. 341.

(*q*) See *ante*, p. 341.

(*a*) Stamp 10s.

incorporating (*inter alia*) the Lands Clauses Acts (except sections 127 to 132 of the Lands Clauses Consolidation Act 1845)

AND WHEREAS A B of —— in the County of —— (hereinafter called "the Owner") is the estate owner in respect of the fee simple of the said lands which were conveyed to him for the purposes set out in the Second Schedule hereto

AND WHEREAS the Corporation have duly served notice under section 18 of the Lands Clauses Consolidation Act 1845 of their intention to take the said lands

This is necessary; see s. 6 (4) of Act of 1944.

AND WHEREAS the Corporation have agreed with the Owner that the sum of £—— shall be the amount of compensation or purchase money payable by the Corporation for the taking of the said lands which sum it has been agreed shall include compensation for all damage by severance injurious affection or otherwise

AND WHEREAS the Owner is not entitled to dispose of the said lands absolutely for his own benefit and has failed to adduce a good title to the said lands to the satisfaction of the Corporation

AND WHEREAS the Corporation on the —— day of —— pursuant to the powers conferred upon them by section 76 of the Lands Clauses Consolidation Act 1845 deposited the said sum of £—— with the Bank of England to the account of the Paymaster-General for and on behalf of the Supreme Court of Judicature to the credit of "Ex parte the Mayor Aldermen and Burgesses of the Borough of —— in the County of —— in the Matter of the Housing (Temporary Accommodation) Act 1944 the account of A B in respect of — Plots of land situate at —— in the Borough of —— aforesaid".

This must agree exactly with the title of the Ledger Credit.

NOW THIS DEED WITNESSETH that in pursuance and in exercise of the power for this purpose conferred upon them by sections 75 and 77 of the Lands Clauses Consolidation Act 1845 and of every other power enabling them the Corporation to the intent to vest in themselves the estate in fee simple in possession of the said lands free from incumbrances hereby declare

(a) that the said lands are the property in respect whereof the deposit of the said sum of £—— was made in manner aforesaid

(b) that the said lands have been purchased and taken by the Corporation for the purposes of the Housing (Temporary Accommodation) Act 1944

(c) that such deposit was made to the credit aforesaid under the circumstances hereinbefore appearing by reason of the Owner failing to make a title to the said lands to the satisfaction of the Corporation and

(d) that the said lands are vested in the Corporation and their assigns in fee simple free from incumbrances accordingly.

IN WITNESS *etc.*

THE FIRST SCHEDULE ABOVE REFERRED TO.

[*Description of Land.*]

THE SECOND SCHEDULE ABOVE REFERRED TO.

[*Set out purposes for which land was conveyed which preclude the owner from disposing of it for his own benefit.*]

Form 15.

Voluntary Settlement of Investments on Existing Infant Children to avoid Income Tax and Surtax (*a*).

Parties.

THIS SETTLEMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Settlor") of the one part and B of *etc.* and C of *etc.* (hereinafter called "the Trustees") of the other part.

Recitals: desire to make settlement:

WHEREAS:—

(1) The Settlor is absolutely entitled to the investments and sum of cash specified in the Schedule hereto and is desirous of making such settlement thereof upon his son D (hereinafter called "the Son") and his daughter E (hereinafter called "the Daughter") (infants who were born on the —— day of —— and the —— day of —— respectively) as is hereinafter contained

transfer of investments.

(2) The Settlor has transferred the said investments and cash to the Trustees to be held by them upon the trusts and with and subject to the powers and provisions hereinafter declared and contained concerning the same.

NOW THIS DEED made in consideration of the natural love and affection of the Settlor for the Son and the Daughter WITNESSETH and it is hereby agreed and declared as follows:—

Trust to sell or retain.

1. The Trustees shall stand possessed of the said investments and sum of cash specified in the said Schedule hereto UPON TRUST in their discretion either to allow the said investments to remain as now invested or at any time or times to sell the same or any of them and at their discretion to invest the net proceeds of sale and the said sum of cash in or upon any of the investments hereinafter authorised with power at their discretion to vary any such investments for others of a like nature.

2. The Trustees shall stand possessed of the said investments and sum of cash specified in the said Schedule hereto and the investments for the time being representing the same (hereinafter called the trust premises) upon the trusts and with and subject to the powers and provisions following that is to say:—

Trusts of son's share; for him at twenty-two with substitution of children.

(1) IN TRUST as to one moiety thereof (hereinafter called the Son's moiety) for the Son if and when he shall attain the age of twenty-two years PROVIDED that if the Son shall die under the age of twenty-two years leaving a child or children him surviving the Son's moiety shall be held IN TRUST for all or any the children or child of the Son who being male shall attain the age of twenty-one years or being female shall attain that age or marry and if more than one in equal shares (*b*)

Discretionary power to apply income for maintenance or accumulate.

(2) During the residue of the life of the Settlor or until the Son shall attain the age of twenty-two years or die in the lifetime of the Settlor (whichever period shall be the shortest) the Trustees may pay

(*a*) As to settlements for this purpose see generally an article by the draftsman of these Precedents in the present number of *The Conveyancer*.

(*b*) This provision may be advisable. The share may be made to vest on marriage, which would be the usual method of providing for the children, but this would involve the risk that the income might be treated as the settlor's income for the period between the marriage and the end of the financial year at the commencement of which the son was an infant and unmarried.

or apply the income of the Son's moiety or such part of such income as the Trustees in their absolute and uncontrolled discretion (having regard to the age and requirements of the Son and his children (if any) the amount of any other fund available for the purpose and the ability of the Settlor to maintain him) from time to time think fit for or towards the maintenance education or benefit of the Son and the Trustees may either so apply the said income or such part thereof as aforesaid themselves or pay the same to the Settlor for the purposes aforesaid and the Settlor shall be liable to account for the application of the same if so required but the Trustees shall nevertheless not be under any liability for not requiring an account or seeing to the application thereof (*c*)

(3) During the period aforesaid the Trustees shall accumulate the residue (if any) of the income of the Son's moiety not so paid or applied as aforesaid in the way of compound interest by investing the same and the resulting income thereof from time to time in any of the investments hereinafter authorised with power to vary such investments and all accumulations so produced and the investments for the time being representing the same shall be an accretion to follow the destination of the capital of the property from which they arose and as one fund with such capital for all purposes

(4) In the event of the Settlor dying before the Son shall attain the age of twenty-one years the statutory power for maintenance shall apply to the Son's moiety during the residue of his minority

Statutory powers to apply.

(5) The statutory power of advancement shall apply to the contingent interest of the Son in the Son's moiety and the statutory powers of maintenance and advancement shall apply from and after the death of the Son to the contingent shares of the children of the Son in the Son's moiety

Application of income after settlor's death.

(6) From and after the date when the Son attains twenty-one or if the Settlor is living on that date then from the death of the Settlor the income of the Son's share shall be payable to the Son for his own use and benefit absolutely until he shall attain the age of twenty-two years or die under that age

Accruer clause.

(7) If the trusts hereinbefore declared concerning the Son's moiety shall fail then subject to any exercise of the powers hereby or by law vested in the Trustees the Son's moiety shall go and accrue by way of addition to the moiety of the Trust Premises hereinafter directed to be held in trust for the benefit of the Daughter and her children and shall be held upon the trusts and with and subject to the powers and provisions hereinafter declared and contained concerning such last mentioned moiety or as near thereto as circumstances will permit and as one fund therewith for all purposes

Trusts of daughter's share.

(8) The remaining moiety of the Trust Premises (hereinafter called the Daughter's moiety) shall be held upon the like trusts and with and subject to the like powers and provisions (including the accruer clause) for the benefit of the Daughter and her children as are

(*c*) Income actually paid or applied under the power will be treated as the settlor's income for income tax purposes, but this is unavoidable. There may be a possible claim in the event of the settlor's death in the lifetime of the son in respect of the income which becomes absolutely payable to the latter between such death and the son's attainment of twenty-two; but the value of the interest deemed to pass cannot exceed one year's income and will be less than the possible liability for income tax.

hereinbefore declared concerning the Son's moiety in the same manner in all respects as though the same were repeated herein with the substitution of the expression " the Son " for the expression " the Daughter " wherever the same occurs

Ultimate trust.

(9) Subject to the trusts hereinbefore declared and to any exercise of the powers hereby or by law conferred on the Trustees the capital and income of the Trust Premises shall be held IN TRUST for [D] [the Settlor] absolutely (*d*).

Investment clause.

3. (1) Money subject to the trusts hereof may be invested in or upon

(i) The Public Stocks Funds or Government securities of the United Kingdom or India or any colony

(ii) Securities the interest on which is guaranteed by Parliament

(iii) Metropolitan or London County Stock or the stocks bonds debentures or other securities of any municipality county or district council public body or local authority in the United Kingdom

(iv) The bonds debentures debenture or rentcharge stock mortgages obligations or securities or the guaranteed preference or ordinary stock or shares of any company public or private (wherever carrying on business) incorporated by Special Act or by or under any Public General Act or Acts of the Imperial Parliament or the Legislature of any Colony or by Royal Charter

(v) The security of any interest for life or vested or contingent interest in real or personal property in the United Kingdom together with a policy of assurance on the life or against the contingency

(vi) Freehold or leasehold securities (whether or not by registered charge under the Land Registration Act 1925) together in the case of leaseholds having less than sixty years to run at the date of such investment with a sinking fund policy for securing a sum not less than 20 per cent. larger than the sum lent

(vii) The purchase of freehold ground rents or other landed property in the United Kingdom of any tenure but leaseholds only if at least sixty years of the term on which the same are held is unexpired

(viii) The shares or deposits of any permanent building society registered in the United Kingdom

(2) For the purposes of this clause the expression " United Kingdom " shall mean the United Kingdom of Great Britain and Ireland and " Colony " shall mean any dominion commonwealth union dependency or colony forming part of the British Empire or any province or State having a local Legislature and forming part thereof respectively but not the Irish Free State

(3) The Trustees shall have power (i) to make such arrangements upon the reconstruction of any company in which they hold stocks shares or securities as if they were the absolute owners of such stocks shares or securities (ii) to release part of any property subject to a security held on the trusts hereof if satisfied that the remaining security is sufficient to cover all money remaining due thereon.

Power to appropriate, etc.

4. The Trustees may (i) determine what moneys are to be considered as capital and what income (ii) determine what expenses

(*d*) Having regard to the provisions of the Finance Act, 1946, it appears to be safer, if it is desired to avoid income being treated as the settlor's income for purposes of surtax, not to insert an ultimate trust for the settlor himself.

costs and outgoings are properly payable out of capital or income (iii) exercise the powers of appropriation conferred by section 41 of the Administration of Estates Act 1925 without any of the consents requisite for the execution of such powers by personal representatives (iv) determine all matters of doubt and questions arising in the execution of the trusts and powers hereof and every such determination (whether expressly or impliedly made) shall be conclusive and binding upon all persons then or thereafter to become interested under the trusts or powers hereof.

[5. *Power for professional trustee to charge.*]

6. The power of appointing a new trustee or new trustees hereof shall be vested in the Settlor during his life. Power to appoint new trustees.

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

[*To contain particulars of the investments and cash.*]

Form 16.

Voluntary Settlement of Investments on Existing Infant Children to avoid Income Tax and Surtax, the Shares being Settled.

THIS SETTLEMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called " the Settlor ") of the one part and B of *etc.* and C of *etc.* (hereinafter called " the Trustees " of the other part. Parties.

WHEREAS :— Recitals:

(1) The Settlor is absolutely entitled to the investments specified in the Schedule hereto and is desirous of making such settlement thereof upon his children D E and F (infants who were born on the —— day of —— the —— day of —— and the —— day of —— respectively) as is hereinafter contained desire to make settlement;

(2) The Settlor has transferred the said investments to the Trustees to be held by them upon the trusts and with and subject to the powers and provisions thereinafter declared and contained concerning the same. transfer of investments.

NOW THIS DEED made in consideration of the natural love and affection of the Settlor for the said D E and F WITNESSETH and it is hereby agreed and declared as follows :—

1. [*Trust to sell or retain the investments etc. as in clause 2 of last Precedent.*]

2. The Trustees shall stand possessed of the said investments specified in the said Schedule hereto and the investments for the time being representing the same (hereinafter called " the Trust Premises ") upon the trusts and with and subject to the powers and provisions following that is to say :— Trusts for children at twenty-two.

(1) In trust for such of them the Settlor's said children D E and F as shall attain the age of twenty-two years and if more than one in equal shares

(2) The share of the Trust Premises hereinbefore directed to be held in trust for each of the said children of the Settlor shall not vest absolutely in such child but shall be retained by the Trustees and held by them upon the trusts and with and subject to the powers and provisions following that is to say :— Trust of children's shares.

Power to apply income for maintenance or accumulate, etc.

(i) During the residue of the life of the Settlor or until the child shall attain the age of twenty-two years or die in the lifetime of the Settlor (whichever period shall be the shorter) the Trustees may apply the income of the child's presumptive share or such part of such income as the Trustees shall in their absolute and uncontrolled discretion (having regard to the age and requirements of the child the amount of any other fund available for the purpose and the ability of the Settlor to maintain him or her) from time to time think fit for or towards the maintenance education or benefit of the child and the Trustees may either so apply the said income or such part thereof as aforesaid themselves or pay the same to the Settlor for the purposes aforesaid and the Settlor shall if so required be liable to account for the application of the same but the Trustees shall nevertheless not be under any liability for not requiring an account or seeing to the application thereof

(ii) During the period aforesaid the Trustees shall accumulate the residue (if any) of the income of the child's presumptive share not so paid or applied as aforesaid in the way of compound interest by investing the same and the resulting income thereof from time to time in any of the investments hereinafter authorised with power to vary such investments and all accumulations so produced and the investments for the time being representing the same shall be an accretion to and follow the destination of the capital of the share from which the same arose and as one fund with such share for all purposes including the hotchpot clause hereinafter contained

(iii) In the event of the Settlor dying before the child shall attain the age of twenty-one years the statutory provisions for maintenance shall apply during the residue of the child's minority

Subject thereto for child for life.

(iv) Subject as aforesaid the Trustees shall pay the income of such child's presumptive share to the child during the residue of his or her life

Trusts for children and issue of child.

(v) After the death of such child the capital and future income of his or her share of the Trust Premises shall be held IN TRUST for the children or remoter issue of such child of the Settlor or for some or one of them at such ages or times and in such shares (if more than one) and for such interests and upon such trusts for their benefit and with such provisions for their maintenance advancement education or benefit at the discretion of any person or persons and generally in such manner as such child shall from time to time by deed revocable or irrevocable or by will or codicil appoint AND in default of and subject to any such appointment IN TRUST for all or any the children or child of such child of the Settlor who being male attain the age of twenty-one years or being female attain that age or marry under that age and if more than one in equal shares

Hotchpot clause.

(vi) No child of such child of the Settlor who or whose issue takes any part of the share of such child in the Trust Premises under any appointment under the power hereinbefore contained shall not in the absence of a contrary intention expressed in such appointment be entitled to any share in the unappointed part except upon bringing the share or shares appointed to him or her or to his or her issue into hotchpot and accounting for the same accordingly

(vii) The statutory powers of maintenance and advancement shall apply for the benefit of the children and remoter issue of such child of the Settlor

Maintenance and advancement.

(viii) If the trusts hereinbefore declared concerning the share of such child of the Settlor shall fail then subject to any exercise of the powers hereby or by law conferred on the Trustees as well the original share of such child as every additional share which may accrue or be added thereto under the present provision shall go and accrue by way of addition to the shares of the other said children of the Settlor if more than one in equal shares and so that the share which shall so accrue and be added to the share of any such child of the Settlor shall be held upon the trusts and with and subject to the powers and provisions hereinbefore declared and contained concerning his or her original share or as near thereto as circumstances will permit and as one fund therewith for all purposes including the hotchpot clause hereinbefore contained

Accruer clause.

(3) Subject to the trusts hereinbefore declared and to any exercise of the powers hereby or by law conferred on the Trustees the capital and income of the Trust Premises shall be held IN TRUST for [D] [the Settlor] absolutely (*z*).

Ultimate trust.

[3. *Investment clause.*]
[4. *Power to appropriate etc.*]
[5. *Power for professional trustee to charge.*]
[6. *Power to appoint new trustees.*]

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

[*This will contain particulars of the investments settled.*]

Form 17.

Voluntary Settlement of Investments on Present and After-born Children to avoid Income Tax and Surtax (*a*).

THIS SETTLEMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called " the Settlor ") of the one part and B of *etc.* and C of *etc.* (hereinafter called " the Trustees ") of the other part.

WHEREAS the Settlor is absolutely entitled to the investments specified in the Schedule hereto and with a view to the settlement hereby effected has transferred the same to the Trustees to be held by them

(*z*) See note (*d*) to last Precedent.

(*a*) After-born children cannot be given absolute interests vesting at twenty-two as this would offend against the rule against perpetuities. If the interests were made to vest at twenty-one, a power of accumulation which continued until the children attained twenty-two (which would be essential in order to prevent accumulations being treated as the settlor's income in the year in which the child attains twenty-one) would be ineffective as they would be entitled to call for payment over of their shares on attaining their majority. Such a power, however, is valid under s. 165 of the Law of Property Act, 1925, if limited by reference to the settlor's life and will be effective if life interests are given to the children. The trusts after the children's life interests must be restricted to those children of a child born within twenty-one years after lives in being. The form of trust adopted in the Precedent is not entirely satisfactory, but there appears to be no better way of settling the shares to attain the desired object.

upon the trusts and with and subject to the powers and provisions hereinafter declared and contained.

NOW THIS DEED WITNESSETH as follows:—

[1. *Trust to sell or retain the investments as in last Precedent.*]

Trust for children at twenty-one.

2. The Trustees shall stand possessed of the said investments specified in the said Schedule hereto and the investments for the time being representing the same (hereinafter called the Trust Premises) upon the trusts and with and subject to the powers and provisions following that is to say:—

(1) In trust for all or any the children or child of the Settlor by any marriage who shall attain the age of twenty-one years and if more than one in equal shares

Settlement of shares;

(2) The share of the Trust Premises hereinbefore directed to be held in trust for each of the said children of the Settlor shall not vest absolutely in such child but shall be retained by the Trustees and held by them upon the trusts and with and subject to the powers and provisions following that is to say:—

[(i) (ii) *and* (iii) *Powers of maintenance and accumulation as in clause* 2 (2) (i), (ii) *and* (iii) *of last Precedent*]

on child for life;

(iv) Subject as aforesaid the Trustees shall pay the income of such child's share to the child during the residue of his or her life

after death for children born within perpetuity period;

(v) After the death of such child the capital and future income of his or her share of the Trust Premises shall be held IN TRUST for the children or child of such child of the Settlor who shall be born in the lifetime of the [survivor of the] Settlor [and his wife ——] and shall attain the age of twenty-one years or being female shall attain that age or marry under that age and the children or child of such child of the Settlor who shall be born after the death of the [survivor of the] Settlor [and his said wife] and shall be living at the expiration of twenty-one years from the death of [such survivor] [the Settlor] or in the case of daughters shall have previously married and if more than one in equal shares

(vi) The statutory powers of maintenance and advancement shall apply for the benefit of the children of such child of the Settlor

ultimate trust (*b*).

(vii) Subject to the trusts hereinbefore declared and to any exercise of the powers hereby or by law conferred on the Trustees the capital and income of the share of such child of the Settlor in the Trust Premises shall be held IN TRUST for [D] [the Settlor] absolutely.

[3. *Investment clause.*]

[4. *Power to appropriate etc.*]

[5. *Power for professional trustee to charge.*]

[6. *Power to appoint new trustees.*]

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

[*This will contain particulars of the investments settled.*]

(*b*) An accruer clause in favour of the other children's shares would be too remote The interests in the Precedent do not offend the rule against perpetuities, as the discretionary trust must terminate and the whole of the beneficial interest be vested within twenty-one years after the settlor's death: cf. *Wainwright* v. *Miller*, [1897] 2 Ch. 255. As to surtax, see note (*d*), p. 350.

Form 18.

Partnership Agreement between two Traders.
Concise Form Applicable to a Small Business (*a*).

(*Drafted by E. H. Bodkin, of Lincoln's Inn.*)

AN AGREEMENT made the —— day of —— 19— BETWEEN A of *etc.* of the one part and B of *etc.* of the other part WHEREBY it is mutually agreed as follows :— Parties.

1. (1) The said A and B shall become partners in the business of —— [in continuation of A's present business] for the term of — years from the —— day of —— determinable as hereinafter mentioned Agreement for partnership.

(2) If in any year it appears from the annual general account that (after crediting interest on capital) the partnership has produced no profits either partner may dissolve the partnership by three months' written notice to the other. Power to determine if no profits.

2. The business shall be carried on in the name of —— at —— or at such other premises as may be agreed. Firm name and premises.

[3. The stock-in-trade and premises of A's business at the commencement of the partnership shall be assets of the partnership and shall be taken at the value of £—— as part of the share of capital of the said A who shall be indemnified by the partnership against the obligations of the lease thereof.] [Assets of A's business to be taken over.]

4. The capital of the partnership shall be £—— to be contributed by the partners in equal shares and [subject as aforesaid] in cash on or before the signing hereof and each partner shall be credited with interest at £—— per cent. per annum on his share of capital before the division of profits. Capital.

5. The partners shall be entitled to the net profits and liable for any losses in equal shares. Profits and losses.

6. Each partner may draw out on account of profits an amount not exceeding £—— during any quarter but shall on signature of the annual general account refund with interest the amount (if any) by which his drawings exceed his share of profits for that year. Drawings.

7. All money and securities not required for current expenses shall be paid into and deposited with the —— Bank or such other bank as may be agreed and either partner may draw cheques on the partnership account. Bankers.

8. Neither partner shall without the written consent of the other :— Restrictions on powers of partners.

(i) Carry on or be concerned in any competing trade or business

(ii) Assign or charge his share in the partnership

(iii) Obtain any goods on account of the partnership of a greater value at one time than £——

(iv) Hire or dismiss any employee or take an apprentice.

9. Proper books of account shall be kept by the partners and such books and all letters papers and documents shall be kept at the chief place of business of the partnership and shall be open to inspection by either partner. Books of account.

10. On the —— day of —— in every year (including the first) a general account showing the assets and liabilities of the partnership Annual account.

(*a*) Stamp *ad val.*

and the share of capital and profits due to each partner shall be taken and such account shall be signed by and shall thereupon become binding upon both partners except that any manifest error found and signified by either partner to the other within —— months shall be rectified.

Provisions for dissolution.

11. (1) Upon dissolution of the partnership

(i) by the death or bankruptcy of a partner

(ii) consequent upon the lunacy incapacity or misconduct of a partner

(iii) under section 33 (2) of the Partnership Act 1890

(iv) by notice hereunder

the other partner shall have the option of purchasing the share of the partner who shall have occasioned such dissolution (hereinafter called the outgoing partner) in the goodwill and other assets at a price to be agreed and in default to be fixed under the arbitration clause hereinafter contained and such option shall be exercised by giving notice in writing within three months to the outgoing partner or his representatives

(2) The purchase money shall be secured by the bond of the purchasing partner and be paid by — equal quarterly instalments (the first payable three months after the dissolution) with interest at £— per cent. per annum on the amount for the time being unpaid

(3) The outgoing partner shall not during the remainder of the partnership term of — years carry on or be concerned in the business of —— within a radius of —— miles from the chief place of business of the partnership at the date of dissolution

(4) Subject as aforesaid the partnership shall be wound up as provided by the Partnership Act 1890.

Notices.

12. Any notice to be given hereunder may be left at the chief place of business of the partnership.

Arbitration clause.

13. Any dispute in relation to the partnership shall be referred to a single arbitrator pursuant to the Arbitration Acts 1889—1934.

AS WITNESS *etc.*

Form 19.

Deed of Partnership between Medical Practitioners (*a*).

(*Drafted by E. H. Bodkin, of Lincoln's Inn.*)

THIS DEED OF PARTNERSHIP is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called the Senior Partner) of the one part and B of *etc.* (hereinafter called the Junior Partner) of the other part — Parties.

WHEREAS :— — Recitals: senior partner's practice.

(1) The Senior Partner has for some years carried on the profession of a Physician and Surgeon at ——

(2) The Senior Partner has agreed to take the Junior Partner into partnership with him on the terms hereinafter mentioned in consideration of the payment by the Junior Partner of the premium of £—— and the sum of £—— representing the value of the effects hereinafter referred to owned and employed by the Senior Partner in his said practice which premium and sum of £—— and £—— respectively have been paid or secured by the Junior Partner to the Senior Partner as the Senior Partner hereby acknowledges (*b*)

NOW THIS DEED made in consideration of the premises WITNESSETH and it is hereby agreed as follows :—

1. (1) The Senior Partner and the Junior Partner hereby mutually covenant and agree with each other that they will become partners in the profession of physicians and surgeons from the —— day of —— for the term of their joint lives but determinable as hereinafter provided — Agreement to practise in partnership.

(2) The partnership shall not be dissolved by reason only of the Senior Partner or the Junior Partner or both of them entering their names on the List (which they shall respectively be at liberty to do notwithstanding any of the provisions hereof) or by reason only that the partnership hereby constituted or any of the provisions thereof shall under the Act or the Regulations be or become unlawful or incapable of being carried out according to the tenour thereof but either partner may require that the question whether having regard to the provisions of the Act or the Regulations for the time being the partnership shall — Questions under the Act to be referred to arbitration

(*a*) This Precedent is designed primarily to cover the transitional period until the details of the proposed General Medical Service have been worked out. Although the National Health Service Act, 1946, is now law and is intended to come into operation on April 1, 1948, the whole position of doctors as to the desirability, or even possibility, of carrying on private practice will be uncertain until agreement is reached as to the form of the Regulations under the Act, which, it appears, may be delayed. But even after the Regulations are issued they, and the Act, may be found to require amendment, particularly in regard to the provisions as to goodwill, and it is even possible that the whole scheme might on a change of Government be repealed. The Precedent may therefore be found to have more than a temporary use. The questions which may arise under medical partnerships are too far-reaching to be covered by the ordinary arbitration clause, and the best way of providing for eventualities appears to be to confer on the arbitrator the widest powers of dissolving or continuing the partnership on terms. It is assumed in the Precedent that the partners have not decided whether or not to join the medical service.

The stamp will be *ad valorem* on the amount of the premium.

(*b*) The payment of a premium would be illegal if the senior partner had already joined the General Medical Service. See s. 35 (1), (4), of the Act.

be continued or dissolved or the terms thereof varied be referred to arbitration under the arbitration clause hereinafter contained and the arbitrator shall have power to award that the same shall so continue or be dissolved and in either case upon such terms as he may consider just and fair having regard to all the circumstances

or the Medical Practices Committee.

(3) The question whether any transaction or series of transactions proposed to be carried out under this Deed is unlawful shall at the request of either partner be referred to the Medical Practices Committee the certificate of which shall be binding upon the partners and their representatives for the purposes thereof.

Power to determine partnership by notice.

2. (1) Either partner may determine the partnership at any time if the other shall (a) cease to practise except at a fixed salary under the General Medical Service or (b) be directed to perform permanent duties under the General Medical Service at a distance exceeding —— miles from the partnership surgery or consulting room at the date of such direction or if there shall not be any at such date from the then residence of the partner giving such notice

(2) Such determination shall be effected by six months' notice in writing to the other partner and on the expiration of such notice the partnership shall be determined accordingly and the partner giving such notice shall have the like option of purchasing the other partner's share in the unpaid profits goodwill and other assets of the partnership and on the like terms (mutatis mutandis) as though the partnership had been determined by one of the means specified in clause 18 hereof.

Power to retire and sell share or introduce son.

3. Either partner may retire from the partnership upon the terms and conditions following that is to say—

(1) The partner desiring to retire shall give six months' notice in writing to the other partner of his intention so to do expiring in the case of the Senior Partner not earlier than the —— day of —— and in the case of the Junior Partner not earlier than the —— day of —— and on the expiration of such notice the partnership shall be determined accordingly

(2) The partner to whom such notice is given shall have the like option of purchasing the retiring partner's share in the unpaid profits goodwill and other assets of the partnership and on the like terms (mutatis mutandis) as though he had himself determined the partnership under the power for that purpose hereinbefore contained

(3) If the partner to whom such notice is given shall not exercise the option aforesaid within the time hereby limited therefor the retiring partner shall be at liberty either to advertise his said share for sale and to sell the same to any duly qualified practitioner or in the case of the Senior Partner to transfer and make over such share to any son of his who may then be so qualified and the retiring partner shall be at liberty to introduce the purchaser or transferee to the patients of the partnership and such purchaser or transferee shall execute a proper deed of accession defining his rights and liabilities and shall thereupon become a partner accordingly and be in a similar position in that respect to the retiring partner but so that he shall not be entitled to retire from the partnership under this present clause before the —— day of ——.

4. The partnership shall be carried on under the style or firm name of A and B at the surgery or consulting room of the Senior Partner at —— and at the respective residences of the partners or at such other premises as may be agreed from time to time. Name and place of business.

5. The motor and other vehicles accessories and horses instruments apparatus drugs bottles phials and other chattels employed by the Senior Partner in his professional practice at the commencement of the partnership and the leasehold surgery or consulting room on which the same is carried on shall be assets of the partnership and the Senior Partner shall be indemnified by the partnership against the obligations of the lease of the said premises. Assets of senior partner's practice to be taken over.

6. All salaries and other remuneration received from any appointments held or to be held by the partners or either of them (including salaries capitation fees or other remuneration in respect of services and duties under the General Medical Service) and all premiums from pupils or apprentices and pecuniary gratuities from patients (other than legacies) and all other professional emoluments of any description whether ordinary or extraordinary shall be treated and accounted for in the partnership books as profits of the partnership. Salaries, etc., to be accounted for.

7. All outgoings of whatsoever kind and expenses incurred in carrying on the partnership or in anywise relating thereto (including any expenses incurred in indemnifying the Senior Partner or his representatives against his liability under the said lease of the said surgery or consulting room) shall be charged against revenue and any deficiency shall be borne by the partners in the shares in which they are for the time being entitled to the profits of the partnership. Outgoings.

8. The partners shall be entitled to the net profits of the partnership and liable for any losses in the shares following that is to say— Profits.

9. Each party may draw out on the 1st day of each month on account of profits an amount not exceeding £—— but shall on signature of the annual general account refund with interest the amount (if any) by which his drawings exceed his share of profits for that year. Drawings.

10. All moneys and securities not required for current expenses shall be paid into and deposited with the —— Bank or such other Bank as may be agreed from time to time and either partner may draw cheques on the partnership account. Bankers.

11. (1) Proper books of account shall be kept by the partners and entries made therein of all attendances and such other matters transactions and things as are usually entered in books of account kept by physicians and surgeons and such books and all letters papers and documents shall be kept at the surgery or consulting room aforesaid or in the custody of the Junior Partner and shall be open to inspection by either partner Accounts.

(2) On the —— day of —— in every year of the partnership (including the first) a general account showing the assets and liabilities of the partnership and the share of profits due to each partner shall be taken and such account shall be signed by the partners and shall thereupon become binding upon both partners except that any manifest

error found and signified by either partner to the other within —— months shall be rectified.

Partners to be just and faithful.

12. Each partner shall be just and faithful to the other in all transactions relating to the partnership and shall give a true account of the same when reasonably required by the other.

To pay their separate debts.

13. Each partner shall punctually pay and discharge his present and future separate debts and engagements and shall at all times keep the other partner and his representatives and the partnership assets indemnified against the same and against all actions proceedings costs charges claims and demands in respect thereof.

To attend to partnership business.

14. (1) Each partner shall at all times devote the whole of his time and attention to the partnership business (including any professional services and duties to be performed under the General Medical Service) and carry out the same for the greatest advantage of the partnership and shall not without the written consent of the other partner carry on or be concerned or interested whether alone or as partner in any competing professional business unless required so to do under the General Medical Service

Vacations.

(2) Each partner shall nevertheless be entitled to vacations not exceeding in the aggregate —— weeks in each year

Power to appoint locum tenens.

(3) If either partner shall absent himself voluntarily from the partnership business for an aggregate period in any one year exceeding the aggregate period hereinbefore specified for vacations or shall absent himself for illness accident or other unavoidable cause for a continuous period exceeding —— days the other partner may engage and pay at the sole cost of the partner so absenting himself a qualified locum tenens until the absent partner shall again attend to the partnership business PROVIDED that the partner so absenting himself shall be entitled at his option to reckon any period of absence as a period of vacation for the purposes of this clause.

Restrictions on acts of partners.

15. Neither partner shall without the consent of the other

(i) assign or mortgage his share in the partnership

(ii) hire or (except in case of gross misconduct) dismiss any person in the employment or service of the partnership or introduce any person into the partnership as an apprentice or otherwise

(iii) do or knowingly suffer anything whereby the property of the partnership may be seized or taken in execution.

Power to expel partner.

16. (1) If either partner shall (a) fail to account for or to pay over or refund any moneys for which he is accountable to the partnership within —— days after being required so to do in writing by the other partner (b) suffer his share to be charged for his separate debt (c) become bankrupt or insolvent or enter into any arrangement or composition with his creditors (d) commit any flagrant breach of professional etiquette or of his duties as partner (e) be expelled from the General Medical Service or (f) become permanently incapacitated by lunacy ill-health accident or otherwise from performing his part of the partnership contract then and in any such case the other partner may by notice in writing to the defaulting partner expel him from the

partnership and publish a notice of dissolution of the partnership in the London Gazette and the partnership shall be determined as from the date of the giving of such notice of expulsion but without prejudice to any antecedent breach of the provisions of the partnership express or implied

(2) A partner expelled under the present clause shall have no right of access to the books of the partnership or to join in taking any annual general account or valuation hereunder

(3) The other partner shall have the like option of purchasing the share of the expelled partner in the unpaid profits goodwill and other assets of the partnership and on the like terms (mutatis mutandis) as though the expelled partner had retired from the partnership under the power for that purpose hereinbefore contained.

Power for junior partner to purchase further share.

17. The Junior Partner shall have the option to be signified to the Senior Partner in writing on or before the —— day of —— of purchasing from the Senior Partner a further share not exceeding one —— share of the future profits goodwill and other assets of the partnership as from such day upon the terms contained in clause 18 (*mutatis mutandis*) as though the date aforesaid were the date of determination of the partnership but so that no sum shall be payable in respect of the unpaid profits due to the Senior Partner at the date aforesaid which shall belong to him.

Provisions for dissolution;

18. (1) Upon determination of the partnership

(i) by the death or bankruptcy of either partner

(ii) consequent upon the lunacy incapacity or misconduct of either partner

(iii) under section 33 (2) of the Partnership Act 1890 the other partner shall have the option of acquiring as from the date of dissolution the share of the partner who shall have occasioned such determination (hereinafter called the outgoing partner) in the unpaid profits goodwill and other assets of the partnership and such option shall be exercised by giving notice in writing within three months of such determination to the outgoing partner or his representatives

Valuation of share;

(2) The purchase money for such share shall be the fair value thereof at the date of determination for which purpose a valuation shall be made of any assets requiring valuation and (subject as hereinafter provided) the goodwill shall be valued at —— years' purchase of the average profits of the partnership calculated (if the partnership shall so long have continued) during the —— years immediately preceding the then last day for taking the annual general account and if not then from the commencement of the partnership up to that date

No payment for goodwill if illegal;

(3) PROVIDED that if under the Act or the Regulations payment of the said sum in respect of the share of goodwill to be purchased shall be or become unlawful prior to the payment of the last instalment of purchase money by reason of either partner having been entered on the List or otherwise or if the Senior Partner previously to the date for payment of such last instalment shall have become entitled to compensation (whether immediate or deferred) in respect of his whole interest in the goodwill (including the purchased share) then and in either of such cases the option conferred by this clause shall be construed and have effect as though it had expressly provided that no

payment should be made in respect of goodwill and any sums already paid by the purchasing partner attributable to such goodwill shall be refunded to him PROVIDED also that if either partner prior to payment of the last instalment of purchase money be entered on the List any premises used for the purposes of the partnership shall be valued on the footing that they have not been previously used for the purposes of a medical practice or in any other manner requisite to comply with the Act or the Regulations (*c*)

Payment of purchase-money.

(4) The purchase money when ascertained shall be paid by —— equal quarterly payments (the first to be paid —— months after the aforesaid date of determination) with interest at £—— per cent. per annum on the amount for the time being unpaid and shall be secured by the bond of the purchasing partner

(5) The outgoing partner or his representatives shall do all acts and sign all documents necessary to vest in the purchasing partner the goodwill and other assets of the partnership at the date of determination

Subject to option Partnership Act to apply.

(6) Subject as aforesaid the partnership shall be wound up as provided by the Partnership Act 1890.

Repayment of premium.

19. If the partnership shall be determined before the end of the third year thereof by any means other than the expulsion of the Junior Partner the Junior Partner or his representatives shall be entitled in addition to the other sums due to him or them hereunder to repayment by the Senior Partner or his representatives of a portion of the said premium of £—— paid by the Junior Partner bearing the same proportion to the entirety thereof as the period of the partnership term expired at the date of determination bears to the term of three years.

Covenant not to compete.

20. The partners hereby mutually covenant and agree that in consideration of the agreement for partnership hereinbefore contained a partner who retires or is expelled under the provisions for that purpose hereinbefore contained shall not for a period of —— years from his retirement or expulsion (unless he shall under the Act or the Regulations be directed so to do) whether alone or in partnership practise as physician or surgeon or be directly or indirectly concerned or interested in any competing professional business within a radius of —— miles from the partnership surgery or consulting room at the date of his retirement or expulsion or if there shall not be any at that date from the then residence of the other partner (*d*).

Notices.

21. The provisions of section 196 of the Law of Property Act 1925 shall extend to all notices to be given under this Deed.

Arbitration clause.

22. If during the continuance of the partnership or at any time afterwards any dispute difference or question shall arise between the

(*c*) Payment for goodwill will be illegal if the deceased partner has joined the service, and it has been suggested that the same will apply even if the purchasing partner alone has done so. Apparently compensation for goodwill is payable in respect of the share of a partner existing on the appointed day and only if his name is then entered on the List. But under s. 37 of the Act a partner will be entitled, even if his name has not been so entered, on the application of himself or his personal representatives to compensation if he retires or dies before the appointed day and his share has not been sold before then, as though his name had been entered on the List on the appointed day, and thereafter the restrictions on the sale of goodwill will apply.

(*d*) This covenant, it is submitted, is saved from being unlawful by the proviso to s. 35 (6) of the Act.

partners or their representatives touching the partnership or the accounts or transactions thereof or the determination or winding up thereof or the construction meaning or effect of this Deed or anything herein contained or the rights and liabilities of the partners or their representatives under this Deed or otherwise in relation to the premises such dispute difference or question shall (subject to the provisions of clause 1 hereof) be referred to a sole arbitrator to be nominated by the President for the time being of the Royal College of [Physicians] [Surgeons].

Declaration as to value.

23. It is hereby declared and certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds the sum of £500.

Interpretation clause.

24. For the purposes of this Deed "the Act" shall mean the National Health Service Act 1946 or any statutory modification or re-enactment thereof for the time being in force and "the Regulations" shall mean any statutory rules and orders or regulations made or to be made under the Act or otherwise for the purpose of bringing into operation or regulating arrangements for the provision of a general medical service and "General Medical Service" shall mean any scheme providing general medical service (including surgical and specialist service) established for the public under the Act or the Regulations and "the List" shall mean the list of medical practitioners undertaking to provide general medical services under the Act.

IN WITNESS *etc.*

Form 20.

(Drafted by Harold Potter, LL.D., of Gray's Inn.)

I

Transfer of Land of which a Lunatic is Registered Proprietor (*a*).

H.M. Land Registry.

Land Registration Acts, 1925—1936.

District ——
Title No. ——
Property ——

[Date.] 1. In consideration of —— pounds (£——) lodged in Court pursuant to an Order dated the —— day of —— and made under the Act 53 Vict. c. 5 and Amending Acts as appears by the certificate of the Accountant-General of the Supreme Court dated the —— day of —— the receipt whereof is hereby acknowledged I A B of *etc.* [*registered proprietor*] [*the address must not disclose that the lunatic is in an asylum*] acting by C D of *etc.* [*the Receiver or Committee*] as Beneficial Owner (*b*) hereby pursuant to the said Order transfer to E F of *etc.* [*purchaser*] the land comprised in the title above referred to [for the residue of the term hereby granted] [subject to and with the benefit of the restrictive conditions specified in the Schedule hereto].

2. Provided always and it is hereby declared that the covenants which are implied by reason of the said A B hereby granting and being expressed to grant as Beneficial Owner shall extend to any interests rights or liabilities which by section 70 of the Land Registration Act 1925 are declared not to be incumbrances within the meaning of the Act [and which were not prior to completion of this transfer apparent by inspection of the land hereby transferred or by search or to which this transfer was not by contract made subject].

[3. *If any restrictive covenants already exist add the usual covenant to perform and indemnify.*]

[4. I the said A B acting by the said C D hereby acknowledge the right of the purchaser to the production of the deeds and documents mentioned in the Schedule hereto (possession of which is retained by me) and to the delivery of copies thereof and hereby undertake for the safe custody of the same (*c*).]

5. This instrument of transfer has been settled and approved by the Master referred to in the said Order as appears by his seal impressed in the margin hereof.

6. [*Certificate of value.*]

Signed and sealed by A B by C D (*d*)
acting as aforesaid.

The Schedule above referred to.

(*a*) This and the ensuing forms have been approved by the Management and Administration Department.

(*b*) A lunatic can enter into all proper covenants including covenants for title: *Re Ray*, [1896] 1 Ch. 468.

(*c*) Omit this undertaking if the lunatic is a tenant for life.

(*d*) The signature should be "A B by C D". The words "as Receiver" or "as Committee" should not be added.

II

Transfer by a Receiver in Lunacy with Variations where Registered Chargee Joins to Receive Part of the Purchase Money (*a*).

H.M. LAND REGISTRY.

LAND REGISTRATION ACTS, 1925—1936.

District ——
Title No. ——
Property ——

[Date.] 1. In consideration of the sum of —— pounds (£——) paid to A B of *etc.* [*registered proprietor*] and of —— pounds (£——) paid to C D of *etc.* [*registered chargee*] (the receipt whereof [*or* of which respective sums] is hereby acknowledged [by the said A B and the said C D respectively]) I [the said] A B as trustee hereby transfer to E F of *etc.* [*the purchaser*] the land comprised in the title above referred to [for the residue of the term granted by the registered lease] [*And* I the said C D as Mortgagee hereby discharge the said land comprised in the title above referred to for the residue of the term granted by the registered lease] from the charge dated the —— day of —— and registered the —— day of —— and of which I am the registered proprietor and from all liability in respect thereof [*and if a term of years was created by the charge add* : to the intent that the term created by the said charge shall merge in the freehold reversion of the land thereby charged].

2. And it is hereby declared that the covenants for title implied by section 77 of the Law of Property Act 1925 by reason of the said A B being expressed to transfer as Beneficial Owner and by the said C D being expressed to discharge the said charge as mortgagee shall be deemed to include all interests rights or liabilities deemed not to be incumbrances by section 70 of the Land Registration Act 1925 [except such as were at the date of the registration of this transfer apparent by inspection of the said land or by search or to which this transfer by contract expressly made subject].

3. [*Add appropriate clauses if there are covenants.*]

4. This instrument of transfer is being executed in pursuance of an Order dated the —— day of —— and issued under the seal of the Master referred to in the Act 53 Vict. c. 5 and Amending Acts [and we the said A B and the said E F hereby apply to the Registrar to withdraw the restriction dated the —— day of —— against the title above referred to (*b*).]

5. This instrument of transfer has been settled and approved by the said Master.

[6. *Statement of value.*]

Executed by A B and C D and attested (*c*).

(*a*) This form assumes that the Receiver is registered proprietor, which will be the case where the property has been purchased during a lunacy. The variations for mortgagees joining can be applied *mutatis mutandis* where the lunatic is registered proprietor and therefore the transfer is in his name.

(*b*) The restriction will be that registered in the form given in Precedent III.

(*c*) See note (*d*) to Precedent No. I.

III

Transfer to a Receiver on Behalf of Lunatic where Master so Orders (*a*).

H.M. Land Registry.

Land Registration Acts, 1925—1936.

District ——
Title No. ——
Property ——

[Date.] 1. In consideration of —— pounds (£——) paid by C D of *etc.* [*Receiver*] out of moneys belonging to E F of *etc.* [*address not disclosing asylum*] pursuant to an Order dated the —— day of —— and made under the Act 53 Vict. c. 5 and Amending Acts in the matter of the said E F (the receipt whereof is hereby acknowledged) I A B of *etc.* [*proprietor*] as Beneficial Owner [*or as the case may be*] hereby pursuant to the said Order transfer to C D of *etc.* [*the Receiver*] the land comprised in the title above referred to [for the residue of the term granted by the registered lease] (*b*) [*Add appropriate clauses for any appurtenant rights leases and restrictive covenants*] (*c*) to hold in trust for E F of *etc.* [*lunatic*] [*whose address must not disclose that he is in an asylum*] his executors administrators and assigns as part of the personal estate of the said E F.

2. Provided always and it is hereby declared that the covenants which are implied by reason of the said A B granting and being expressed to grant as Beneficial Owner [*or as the case may be*] shall extend to any liabilities rights and interests which by section 70 of the Land Registration Act 1925 are declared not to be incumbrances within the Act [and which were not prior to completion of this transfer apparent by inspection of the land hereby transferred or by search or to which this transfer was not by contract made subject] (*d*).

3. [*Where the property is subject to restrictive or positive covenants* (*e*) *add a form of covenant to perform and indemnify the transferor*: I the said C D for myself and my successors in title as such trustee as aforesaid and not so as to impose any personal obligation further and otherwise as such trustee as aforesaid hereby covenant with the said A B and his successors in title that I the said C D and my said successors in title will at all times hereafter duly observe and perform the covenants and conditions contained in a deed dated *etc.* and registered on the Charges Register of the said Title No. —— [and comprised in the Schedule hereto] and henceforth to be observed and performed and will also at all times keep indemnified the said A B his estate and effects from and against all actions proceedings costs claims and demands whatsoever on account of any breach of the said covenants and conditions or any of them.]

(*a*) Ordinarily a transfer should be to the lunatic himself. This precedent applies to the special case where the Master has directed that the Receiver or Committee should take the transfer as trustee.

(*b*) For the formula where the transfer relates to part of the land comprised in the title see 3 K. & E. p. 502.

(*c*) See 3 K. & E., 14th ed., p. 424.

(*d*) See 3 K. & E. p. 128.

(*e*) See *Caton* v. *Newton*, [1940] 1 K. B. 415.

[4. *Add statutory acknowledgment and undertaking if necessary* (*f*).]

5. I the said C D hereby apply to the Registrar for the entry of the following restriction, namely: Except under an Order of the Registrar or an Order of the Master referred to in the said Act 53 Vict. c. 5 and Amending Acts no disposition shall be registered.

6. This Instrument of Transfer has been settled and approved by the Master referred to in the said Order as appears by his seal impressed in the margin hereof.

[7. *Statement of value.*]

THE SCHEDULE ABOVE REFERRED TO.

Executed and attested.

IV

Charge by a Lunatic Otherwise than for Maintenance.

LAND REGISTRATION ACTS, 1925—1936.

District ——
Title No. ——
Property ——

[Date.] 1. In consideration of —— pounds (£——) (lodged in Court pursuant to the Order of the Court hereinafter referred to as appears by the certificate of the Accountant-General of the Supreme Court dated the —— day of —— the receipt whereof is hereby acknowledged by C D on behalf of A B) I A B of *etc.* [*address must not disclose that A B is in an asylum*] acting by C D of *etc.* pursuant to an Order dated the —— day of —— and made under the Act 53 Vict. c. 5 and Amending Acts as Beneficial Owner hereby charge the land comprised in the title above referred to with the payment to E F of *etc.* on the —— day of —— of the principal sum of £—— together with interest thereon at the rate of —— per cent. per annum payable half-yearly on the —— day of —— *etc.* in every year.

2. And I the said A B acting by the said C D (*a*) as aforesaid for myself the said A B and the proprietor or proprietors for the time being of the land hereby charged hereby covenant with the said E F his executors administrators and assigns as follows :—

[*Here follow the appropriate mortgage covenants, such as to insure.*]

3. And it is hereby agreed and declared between the parties hereto :—

[*Add such clauses as the proviso affecting covenants for title* (*b*) *excluding the statutory power to lease etc. and adding:*]

Nothing herein or in the Land Registration Act 1925 shall be construed

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(*f*) For where it may be necessary see 3 K. & E. p. 129.

(*a*) It appears that all proper covenants can be entered into: *Re Ray*, [1893] 1 Ch. 460.

(*b*) Precedent I, cl. 2.

to impose any personal liability upon the said C D otherwise than as trustee for the said A B for the repayment of the said principal sum of £—— and interest hereby secured.

4. This charge has been settled and approved by the Master referred to in the said Order as appears by his seal impressed in the margin hereof.

Signed and sealed by A B by C D.

V

Transfer of Land of which Lunatic or Defective is Registered as Proprietor under the Settled Land Act (*a*).

H.M. LAND REGISTRY.

LAND REGISTRATION ACTS, 1925—1936.

District.

Title No.

Property.

[Date] 1. In consideration of —— pounds (£——) lodged in Court pursuant to the hereinafter mentioned Order as appears by the Certificate of the Accountant-General of the Supreme Court dated the —— day of —— (the receipt whereof is hereby acknowledged by M N of *etc.* and O P of *etc.* [*The Settled Land Act trustees named in the restriction*]) I A B of *etc.* [*registered proprietor's address not disclosing that he is in an asylum*] acting by C D of *etc.* [*the Receiver or Committee*] as Beneficial Owner [*or* as Trustee] by virtue of the power vested in me by the Settled Land Act 1925 and of every or any other power me hereunto enabling [with the consent of the said M N and O P] hereby pursuant to an Order dated the —— day of —— and made under the Act 53 Vict. c. 5 and Amending Acts transfer to E F of *etc.* the land comprised in the title above referred to.

2. [*Take in Clause 2 of last Precedent and Clauses 3 and 4 if they are appropriate.*]

3. We the said M N and O P hereby apply to the Registrar for the removal of the entry in our names of a restriction on the Register registered on the —— day of —— against the land hereby transferred.

4. This instrument of transfer has been settled approved by the Master referred to in the said Order as appears by his seal impressed in the margin hereof.

5. [*Certificate of value.*]

Signed and sealed by A B by C D acting as aforesaid and executed by M N and O P.

(*a*) For power of Receiver in name of lunatic see Settled Land Act, 1925, s. 28. For other notes see previous forms.

Form 21.

Agreement as to the Payment of Excess Profits Tax Post-War Refunds (Finance (No. 2) Act, 1945, ss. 38-42).

(*Drafted by J. J. Somerville, of Gray's Inn.*)

THIS AGREEMENT (*a*) made the —— day of —— 1947 BETWEEN H M of —— J R of —— and L A R of —— (hereinafter called "the Executors" which expression shall where the context so admits include the executors or the survivor of them or the trustees for the time being of the will of M R deceased) of the one part and X Y Z & Co. Limited the registered office of which is situate at —— (hereinafter called "the Company" which expression shall where the context so admits include successors in title) of the other part

WHEREAS :—

(a) M R (hereinafter called "the Testator") late of —— died on the —— day of August 1945 leaving him surviving his widow the said L A R (hereinafter called "Mrs. R") and having by his will dated the —— day of —— 19— appointed the Executors to be the executors and trustees thereof who duly proved the same on the —— day of —— 1945 in the —— District Probate Registry

(b) The Company was incorporated on the —— day of —— 1946 with an authorised share capital of £4,000 divided into 4,000 shares of £1 each and Mrs. R holds —— of such shares

(c) One of the objects for which the Company was established was to enter into and carry into effect with such (if any) modifications or alterations as might be agreed upon an Agreement which had been prepared and expressed to be made between the Executors of the one part and the Company of the other (hereinafter called "the Agreement") a draft of which had been subscribed by Mr. R Y a solicitor of the Supreme Court and to carry on develop and turn to account the business of —— theretofore carried on by the Testator at —— (hereafter called "the Original Business") and the assets comprised in the said Agreement

(d) By the Articles of Association of the Company Mrs. R was appointed Governing Director of the Company during her life so long as she might think fit to hold such office and whilst holding such office Mrs. R should have full control of the business of the Company and should be the Chairman of the Board of Directors and should have authority to exercise all the powers authorities and discretions by the said Articles of Association given to or expressed to be vested in the Directors and all the other Directors of the Company should be under her control and should be bound to conform to her directions in regard to the Company's business

(*a*) Stamp 6d. This Precedent has been submitted to the Advisory Panel for E.P.T. Refunds and approved as being settled to accord with the above Act and the principles laid down by the Panel and deals with the case of a prosperous business which yearly paid large sums in E.P.T. and whose owner died in August, 1945, having by his will appointed executors. The executors formed a company to buy the business. The company desires to obtain the E.P.T. refunds. The Precedent sets out the conditions imposed by the executors on the company. The conditions provide that the refunds obtained shall be repaid to the executors. These conditions required confirmation by the Panel.

(e) The Agreement was executed on the —— day of —— 1946 and under its provisions the Company purchased the goodwill of the Testator's said business the benefit of all pending contracts and orders and all the plant and machinery specified in the Schedule thereto for £4,500

(f) Pursuant to section 38 of the Finance (No. 2) Act 1945 (hereinafter called "the Act") the Company as the successors to the Testator has become entitled to be paid the "post-war refunds" therein mentioned in respect of the original business at the time and upon and subject to the conditions and provisions in the same section and in the next four succeeding sections of the Act

(g) The gross amount of the post-war refunds due to the Executors in respect of the original business is estimated to be £—— or thereabouts

(h) The Company has requested the Executors to concur in an application for and to "make over" (*b*) to the Company the whole of the said sum of £—— or the net amount which the Executors should be entitled to receive under the Act upon and subject to the conditions covenants and provisions herein contained.

NOW THIS DEED WITNESSETH as follows:—

1. (1) Subject to the provisions herein contained and in consideration of the covenants on the part of the Company hereinafter set forth the Executors hereby covenant to apply for and to "make over" to the Company if and when received the net amount of the post-war refunds paid to them under the provisions of the Act

(2) In consideration of the Executors making over such net amount to the Company the Company hereby covenants with the Executors that such net amount will be used in developing or re-equipping the Company's said business and until so used will be so dealt with as to remain available for use when required in developing and re-equipping the said business.

2. For the consideration aforesaid the Executors and the Company hereby mutually covenant to observe the provisions and give the appropriate undertakings required and imposed from and on each of them by section 40 of the Act.

3. (1) The Company hereby covenants with the Executors to repay to the Executors such net amount of the post-war refunds (without interest) so made over by the Executors to the Company under the foregoing provisions within a period of seven days next succeeding the fifth anniversary of the date whereon the Company is paid or receives such net amount subject to the prior agreement of the first debenture-holders

(2) In order to secure to the Executors the repayment of such net amount the Company shall immediately prior to the receipt of such net amount create and issue to the Executors a single debenture (subject to subsisting debentures) for such net amount which shall be charged and shall rank as a second charge on the Company's undertaking

(3) The Company shall execute all such deeds and documents and do all such acts and comply with all statutory regulations as may be necessary or deemed expedient to give complete effect to the provisions

(*b*) These are the statutory words.

of this deed and the cost of filing and registering all such documents where necessary shall be borne and paid by the Company.

4. For the consideration aforesaid the Company hereby covenants as from the date of such making over to indemnify the Executors and their personal representatives from and against all actions claims costs damages demands expenses and proceedings which may or might be made by any beneficiary under the Testator's said will or arise in the course of administration of the Testator's estate in relation to the making over of such net amount or any part thereof to the Company or because of anything done or omitted by the Executors in respect of such making over whereby the Executors became or might become personally liable to any person or persons.

5. For the consideration aforesaid the Company hereby covenants to indemnify the Executors from and against all claims costs demands and expenses which the Executors may incur or which might arise in relation to any appeal by the Executors to the Referee under the provisions of the Act.

IN WITNESS *etc.*

Form 22.

Wills—Appointment of a Bank as Executor and Trustee and of other Persons as Literary Executors with full Powers to act in the Administration and Winding Up of the Testator's Literary Affairs.

(*Drafted by C. R. D. Richmount of Lincoln's Inn.*)

1. I appoint —— Bank Limited (hereinafter called "the Bank") —— of —— in the County of —— and —— of —— in the County of —— (both of whom are hereinafter comprised in the expression and referred to as "my Trustees") to be the executors and trustees of this my will except for the purposes and in respect of such parts of my estate as are hereinafter bequeathed by me to my literary executors hereinafter named and appointed.

I declare that the Bank may act as such executor and trustee on the Bank's published Terms and Conditions now in force including those governing the right of the Bank to remuneration and the incidence of such remuneration as set forth therein as if such published terms and conditions were herein declared.

2. I appoint C D of —— in the County of —— and E F of —— in the County of —— (hereinafter sometimes together called "my Literary Executors") to be the executors of this my will only so far as regards and limited to those parts of my estate which are hereinafter bequeathed to them.

3. (a) I bequeath unto my Literary Executors upon the trusts hereinafter declared all my published works and all the manuscripts of my unpublished works together with all my copyrights and other rights and privileges in my published works and together also with the full right and liberty to publish or complete the publication of my unpublished works in such manner and upon and subject to such terms and conditions as they in their absolute and uncontrolled discretion

shall determine without being accountable for or in respect of any *bona fide* exercise of such discretion

(b) All moneys received by my Literary Executors from any corporation or company firm persons or person in connection with or on account of my works whether already published or hereafter published (either by me or by my Literary Executors pursuant to the powers and discretions hereinbefore conferred upon them) shall be held by my Literary Executors upon trust to pay over and transfer the same to my Trustees who upon receiving such moneys from my Literary Executors shall hold and stand possessed of the same upon the trusts and with and subject to the powers and provisions hereinafter declared and contained of and concerning my residuary estate AND I further declare that as between my Trustees on the one hand and any person hereunder claiming to be a legatee or beneficiary on the other hand all moneys paid to my Trustees by my Literary Executors pursuant to the directions in that behalf hereinbefore contained shall be deemed always to have formed part of my residuary estate

(c) For the purpose of removing all or any doubts which but for this provision might have arisen I hereby expressly declare that my Literary Executors shall be entitled at any time and from time to time to take all or any steps proceedings or actions which they in the interests of my estate shall deem necessary or expedient for the purpose of collecting and getting in any moneys (whether capital moneys or royalties or otherwise) for the time being payable but remaining unpaid in respect of my literary works (whether already published or not) and that my Literary Executors shall be entitled to retain and recoup unto themselves out of all or any moneys from time to time received by them in respect of my said works all costs charges and expenses incurred by them in or about either their collection of and getting in moneys payable to them in respect of my said works or their procuring the publication of such of my literary works as shall at the time of my death be and remain unpublished

(d) Pending the completion of the administration of my estate my Trustees may (without being accountable for any loss occasioned by the exercise by them of this power) advance to my Literary Executors all or any moneys required by my Literary Executors for the purpose of enabling my Literary Executors either to collect or get in moneys payable to them in respect of my works or to procure the publication of my unpublished works or such of my unpublished works as my Literary Executors shall decide to publish or cause to be published.

Form 23.

Surrender by a Tenant for Life of his Interest when the Settled Property will Continue to be Settled Land (*a*).

Drafted by A. H. Withers, Esq., of Lincoln's Inn.

THIS SURRENDER made the —— day of —— 19— BETWEEN A B of *etc.* (hereinafter called "the Releasor") of the one part and C D of *etc.* (hereinafter called "the Remainderman" (*b*) of the other part. Parties.

WITNESSETH and it is hereby declared as follows:—

1. This Surrender is made by the Releasor [in consideration of his natural love and affection for his children and] for divers [other] good causes and considerations. Consideration.

2. In this Surrender the following expressions have the following meanings that is to say:— Definitions

(A) "THE SETTLEMENT" means the document specified in the First Schedule hereto

(B) "THE SETTLED PROPERTY" (*c*) means the property specified in the Second Schedule hereto and the investments and property from time to time representing the same or any part thereof [and all other if any the properties now subject or hereafter to become subject to the limitations or trusts of the settlement].

3. (A) The Releasor hereby conveys (*d*) and surrenders unto the Remainderman ALL the equitable life estate or interest in possession which under the limitations or trusts of the settlement the Releasor now has in the settled property TO THE INTENT and so that such life estate or interest may be wholly extinguished and that (subject as hereinafter stated) the settled property shall henceforth be held upon the trusts and with and subject to the powers and provisions upon which and subject to which the same would from time to time be held if the Releasor had died before the date of this deed Surrender of life interest.

(B) The Releasor hereby releases the settled property from all powers which the Releasor has of charging the same or any part thereof with the payment of any jointures portions or moneys. Release of powers.

4. PROVIDED ALWAYS (*e*) that the foregoing surrender does not include any legal estate or interest [and shall not accelerate any charge already created] but [subject as aforesaid] shall enure for the benefit Proviso as to powers of charging.

(*a*) Stamp *ad valorem*, to be adjudicated. Written notice of this assignment must be given to the Settled Land Act trustees in accordance with s. 137 (2) of the Law of Property Act, 1925. The legal estate has to be transferred to the next estate owner by vesting deed in accordance with S. L. A., 1925, s. 7 (4). For a precedent of such deed see *The Conveyancer*, Vol. 19, p. 327. When such a deed is being prepared it should be considered whether there are any covenants (positive or negative), agreements, or other matters the benefit of which ought to be transferred with the legal estate.

(*b*) The next remainderman (whether or not of full age) should be the person to whom the surrender is made, so as to bring s. 105 of the Settled Land Act, 1925, into operation.

(*c*) It has to be considered whether the release is to be limited to any particular part of the settled property and whether it is to be limited to interests in possession.

(*d*) The deed should make it quite clear that no one is to obtain an estate *pur autre vie* thereunder and that the life interest is to be extinguished.

(*e*) It is important to provide what is to happen to charges already created to take effect on the death of the releasor, and what is to happen to powers which the releasor and others may have of charging jointures portions and other sums. Such powers are in gross and do not cease with the estate of the holders of such powers. See Farwell on Powers, 3rd ed., pp. 10 and 33.

of all persons (other than the Releasor) now interested or hereafter to become interested in the settled property or any part thereof and shall accelerate all interests and powers ranking subsequent to the interest hereby released (*f*).

In witness *etc.*

The First Schedule above referred to.

[*Particulars of the document which in the above written deed is referred to as the settlement.*]

The Second Schedule above referred to (*h*).

[*Particulars of the property freed by the above written deed from the life interest of the Releasor being property held upon the trusts of the settlement.*]

Form 24.

Deed of Surrender or Release of a Mortgage by a Vendor in Favour of a Purchaser where a Mortgage has been Discharged After Completion and Section 115 (2) of the Law of Property Act, 1925, has operated to Vest the Mortgage in the Vendor (*a*).

Parties.

This Surrender [Release] (*b*) is made the —— day of —— 19— between the within named A of *etc.* (hereinafter called "the Vendor") of the one part and B of *etc.* (hereinafter called "the Purchaser") of the other part and is supplemental to (a) the within written (*c*) Mortgage [Legal Charge] (b) a Conveyance made the —— day of —— 19— between the Vendor of the one part and the Purchaser of the other part whereby in consideration of the sum of £— paid as therein mentioned by the Purchaser to the Vendor the Vendor conveyed to the Purchaser in fee simple the property comprised in and subject to the within written Mortgage [Legal Charge] and (c) the above written acknowledgment of receipt dated the —— day of ——

(*f*) It should be considered whether any acknowledgment should be given for the production of any document, for which an acknowledgment will not be given in the vesting deed following this deed.

(*h*) The Second Schedule should show on what trusts and by whom the property therein described is held. It is immaterial whether the property is land, chattels, moneys or stock exchange investments.

(*a*) Stamp 10s., to be adjudicated. It sometimes happens that when a vendor is selling property which he has mortgaged, and the mortgage is to be discharged out of the purchase money at or before completion, the mortgagee executes a statutory receipt at a subsequent date. If the date on the receipt is subsequent to that on the conveyance to the purchaser and the mortgage money is expressed to have been paid by the vendor it is arguable that the receipt will operate under s. 115 (2) of the Law of Property Act, 1925, to transfer to the vendor the benefit of the mortgage as if it had by deed been transferred to him, unless the receipt otherwise expressly provides. By sub-s. (3) of s. 115 it is provided that: "Nothing in this section confers on a mortgagor a right to keep alive a mortgage paid off by him, so as to affect prejudicially any subsequent incumbrancer; and where there is no right to keep the mortgage alive, the receipt does not operate as a transfer". In most cases, however, a subsequent purchaser will not be prepared to rely on sub-s. (3) but will require evidence that the receipt did not operate to transfer the benefit of mortgage to the vendor. This deed will operate to set all such questions at rest.

(*b*) In the case of a mortgage by demise the deed will be by way of surrender. In the case of a charge by way of legal mortgage it will be by way of release.

(*c*) This deed should be indorsed on the mortgage.

19— WHEREAS a question has been raised and doubt expressed as to whether or not the said acknowledgment operated by virtue of the provision contained in sub-section (2) of section 115 of the Law of Property Act 1925 and contrary to the intention of the parties as a transfer to the Vendor of the benefit of the said Mortgage [Legal Charge] and with the object of determining such question removing such doubt and better establishing the title of the Purchaser to the said property free from such Mortgage [Legal Charge] the Vendor has at the request of the Purchaser consented to enter into this deed in manner hereinafter expressed Recital.

NOW THIS DEED WITNESSETH that in consideration of the premises the Vendor as Mortgagee doth hereby surrender and release unto the said Purchaser ALL AND SINGULAR the property demised by or otherwise comprised in the within written Mortgage TO HOLD the same unto the Purchaser discharged from all principal money and interest secured by and from all claims under the said Mortgage and to the intent that the term subsisting thereunder shall emerge and be extinguished in the reversion immediately expectant thereon [*or* release ALL AND SINGULAR the property referred to in and subject to the within written Legal Charge from all principal money and interest secured thereby and from all claims thereunder]. Surrender or release.

IN WITNESS *etc.*

Form 25.

Power of Attorney by a Manager to his Employer to Empower Employer to Apply for Licences, etc. (*a*).

THIS POWER OF ATTORNEY is made the —— day of —— 19— by A B of *etc.* —— whereby the said A B hereby :—

1. ACKNOWLEDGES that he is the manager of the premises No. — *etc.* and that he is employed in that capacity by X Y Ltd. whose registered office is at —— (hereinafter called " the Employers ").

2. UNDERTAKES to hold all licences relating to the said premises numbered —— *etc.* aforesaid for the time being in his name as trustee for the Employers and undertakes and agrees to transfer the same to any nominee appointed by the Employers whenever thereunto required so to do by the Employers.

3. IRREVOCABLY appoints the Employers or their substitute or substitutes to be his true and lawful Attorney in his name and as his act and deed to sign and deliver all such documents and give all such notices and consents and do all such acts as the Employers consider necessary or expedient to withdraw and change the entries relating to the said premises numbered —— *etc.* aforesaid to the nominee or nominees appointed by the Employers.

4. DECLARES that the production of this Power of Attorney before

(*a*) This form was drafted by Mr. P. S. Brown, of Preston. Stamp 10s. Partnerships and limited companies, owning a number of licensed premises, frequently engage their managers either verbally or by letter. When the manager becomes the licensee he holds a very valuable part of his employer's property and it is desirable to ensure the maximum control over the disposal of the licence to the employers. This Power of Attorney is designed to supplement the letter or oral contract. It saves the expense of a formal service agreement which would contain some such clause as in the Precedent.

any Licensing Authority shall be conclusive evidence as against himself of his consent to any renewal new grant or transfer being made.

IN WITNESS *etc.*

Form 26.

Investment Clauses to be Inserted in Settlements or Wills (*a*).

1. WIDE RANGE OF INVESTMENTS.

(1) Money subject to the trusts hereof may be invested in or upon :—

(i) The Public Stocks Funds or Government Securities of the United Kingdom [or India] or any colony [other than India] or of any foreign Government or State or colony or dependency thereof

(ii) The bonds debentures debenture or rentcharge stock mortgages obligations or securities or the guaranteed preference or ordinary stock or shares or ordinary preferred or deferred or other stock or shares of any company public or private wherever incorporated or carrying on business or public municipal or local body or authority in any part of the world [but not including bonds to bearer or other negotiable instruments or any documents of title negotiable by delivery with or without indorsement]

(iii) The units of any investment trust constituted in any part of the world

(iv) The security of any interest for life or vested or contingent interest in real or personal immovable or movable property locally situate in any part of the world together with a policy of assurance on the life or against the contingency

(v) The shares or deposits of any permanent building society registered in the United Kingdom

(vi) Freehold leasehold or chattel real securities (including first charges under the Land Registration Act 1925 and contributory mortgages but not second or subsequent mortgages or equitable mortgages or charges) in England or Wales or first mortgages or securities upon real or immovable whether with or without movable property situate in any other part of the world and with power to contract that the loan shall not be called in for any period PROVIDED that in the case

(*a*) The investment of trust funds is a matter of great importance in present conditions of cheap money, and may cause great difficulty to trustees who wish at the same time to do the best for their beneficiaries and to avoid the risk of speculative investments. The Chancellor has recently said that the range of trustee investments is not to be extended. Whether public opinion will result in a change in the future is doubtful, but the present range hardly presents a desirable field for investment in view of the low yield and the possibility of depreciation of long-term stocks. There is also the risk of the nationalisation of further public utility undertakings. Mortgages, though probably the best investment at the moment, are open to certain objections. They are subject not only to the restrictions on calling in the money in the Rent Restriction Acts (where these apply) but also to the Courts Emergency Powers Act. Trustees may accordingly find themselves in difficulties as to the division of the trust property on distribution. The unfortunate situation in which mortgagees may be placed under the latter Act are illustrated by *Re Chalfont Building Society's Application*, [1941] Ch. 458.

It seems desirable, therefore, to give trustees a very wide discretion as to investment. There are two ways in which this may be done: an investment clause giving a wide range of specified investments, or a clause giving the trustees an unlimited discretion. Forms of each are given here.

of leaseholds having less than sixty years to run at the date of investment a sinking fund policy for securing a sum not less than 20 per cent. larger than the sum lent shall be included in the security

(vii) The purchase of freehold or leasehold property in England or Wales [such leasehold property having not less than sixty years of the term to run at the date of purchase] [but in the case of leaseholds having less than sixty years to run the trustees shall effect or purchase a sinking fund policy or policies for securing a sum or sums equal to the purchase price of the property and the costs of and incidental to the purchase] (*b*)

(2) For the purposes of this clause the expression "United Kingdom" shall mean the United Kingdom of Great Britain and Ireland and "Colony" shall mean any dominion commonwealth union dependency or colony forming part of the British Empire or any province or State having a local legislature and forming part thereof respectively but not the Irish Free State.

2. WIDEST RANGE.

Money subject to the trusts hereof may be invested in the purchase of or upon the security of such land or immovable property of any tenure wheresoever situate or of such personal or movable property (including stocks shares funds or securities) whatsoever and wheresoever or any interest therein respectively and whether involving liability or not or upon such personal credit with or without security as the Trustees in their absolute discretion think fit with power to vary such investments to the intent that the Trustees shall have the same full and unrestricted power of investing and varying investments in all respects as if they were absolutely and beneficially entitled to the trust money to be invested.

3. ANCILLARY POWERS AND PROVISIONS.

Trustees' indemnity.

1. The Trustees shall not be liable for any loss occasioned to the trust property by any investment made by them in good faith if they shall prior to the making thereof have been advised by a bank or stockbroker that the same was a proper investment.

Power to make arrangements on reconstruction of companies.

2. The Trustees shall by way of extension of the powers conferred by section 10 of the Trustee Act 1925 have power to make such arrangements upon the reconstruction of any company in which they hold stocks shares or securities as if they were the absolute owners of such stocks shares or securities.

Power to pay calls and invest in bonus shares.

3. Trust moneys may at the discretion of my Trustees (1) be used for the payment of any calls which from time to time become due in respect of any stocks shares or securities not fully paid of which I may die possessed (2) be invested in any bonus shares which may be allotted to my Trustees in respect of any holding of mine in any company and

(*b*) Land in England or Wales purchased by the trustees of a settlement or will of personal property or of land held on trust for sale must, unless the settlement otherwise provides, be held on trust for sale with power to postpone sale: see Law of Property Act, 1925, s. 32. It is therefore necessary to provide expressly for the form of conveyance; but if it is desired that the trustees shall have any additional powers, *e.g.*, as to raising money by mortgage, these must be expressly conferred by the settlement. The statutory powers are, however, usually sufficient and should not, it is thought, be extended. Form 8 should be used if a sinking fund policy is required.

whether such bonus shares are issued at a premium or fully or partly paid or not and such bonus shares shall be held as an authorised investment for the purposes of this my will (*c*).

Power to vary terms of mortgages.

4. The Trustees may release part of any property subject to a security held on the trusts hereof if satisfied that the remaining security is sufficient to cover all money due thereon and may vary the rate of interest and otherwise modify waive or release any covenant or provision thereof.

Additional powers as to land.

5. The Trustees may during the life of the survivor of the issue now living of His late Majesty King George V and twenty-one years after the death of such survivor (1) apply trust money in making improvements upon any land subject to the trusts hereof or in erecting repairing making structural alterations in or pulling down and rebuilding buildings or other erections upon the same (2) raise money by mortgage for any purpose for which they can apply capital money and the provisions of section 17 of the Trustee Act 1925 shall apply for the protection of the mortgagee.

Deposit of bearer securities.

6. (1) The Trustees shall deposit with a bank chosen by them any bonds to bearer or other negotiable instruments or any documents of title negotiable by delivery with or without indorsement for the time being subject to the trusts hereof and shall insure and keep insured the same against loss or damage by fire theft or defacement. PROVIDED that the deposit of any such bonds instruments or documents of title in accordance with the requirements of any statute or statutory rule order or regulation for the time being in force shall be a sufficient compliance with this requirement

(2) Any premiums or other moneys requisite for effecting or keeping up any such assurance as aforesaid shall be paid out of the income of the trust premises (*d*).

Power to manage land abroad.

7. The Trustees shall hold any real or immovable property (including leaseholds) situate outside England or Wales which may become vested in them free from any right of redemption UPON TRUST to sell the same and shall have in relation thereto all the statutory powers of trustees for sale of land in England including the statutory powers of trustees of appointing agents and attorneys (*e*).

Sinking fund policies as regards leaseholds.

8. (1) The Trustees shall pay the premiums required for effecting and maintaining any sinking fund policy hereby required to be effected or purchased on the occasion of the purchase of leasehold property out of the income of the trust premises and shall pay the purchase money of any such policy purchased by them out of the capital thereof and shall retain the same policies until the money thereby secured shall become payable

(2) The moneys assured by and received in respect of any such policy as aforesaid or the proceeds of sale thereof if the property in

---

(*c*) This clause is intended for insertion in wills only.

(*d*) Under the Exchange Control Bill bearer securities are required to be deposited with an authorised depository.

(*e*) The purchase of land abroad is undesirable for many reasons, not least because of the provisions restricting export of currency outside the sterling area in the Exchange Control Bill, but such land may become vested in the trustees by foreclosure or as forming part of a reversionary interest under a settlement on which money has been advanced.

respect of which the same is taken out or purchased shall be sold UPON the like trusts and with and subject to the like powers and provisions (including this present power) as the money laid out in the purchase of the property and policy so purchased would have been subject if the same had not been so laid out.

Form 27.

Conveyance by Sole Surviving Joint Tenant Appointing an Additional Trustee and Conveying to a Purchaser Under the Statutory Trust for Sale (*a*).

THIS CONVEYANCE made the —— day of —— 19— BETWEEN A B of *etc.* (hereinafter called the Appointor) of the first part C D of *etc.* (hereinafter called the Trustee) of the second part the Appointor and the Trustee (hereinafter together called the Vendors) of the third part and E F of *etc.* (hereinafter called the Purchaser) of the fourth part

WHEREAS :—

(1) By a conveyance dated the —— day of —— and made between X Y of the one part and the Appointor and P Q of the other part the property hereinafter described and intended to be hereby conveyed was assured to the Appointor and the said P Q for a legal estate in fee simple as joint tenants upon the statutory trust for sale and the statutory power of appointing new trustees was vested in the Appointor and the said P Q

(2) The said P Q died on the —— day of ——

(3) The Appointor has agreed with the Purchaser for the sale to him of the said property for the sum of £— and the Purchaser has requested the Appointor to appoint a new trustee to act jointly with him the Appointor in the said statutory trust for sale

(4) The Appointor is desirous of appointing the Trustee to act in the statutory trust for sale as aforesaid in the place of the said P Q

(5) The Trustee hereby consents as testified by his execution hereof to his appointment as such new trustee as aforesaid and to join with the Appointor in conveying the said property to the Purchaser in pursuance of the recited contract for sale.

NOW THIS DEED WITNESSETH as follows :—

(1) In exercise of the power for the purpose by the statute in that behalf given to the Appointor and of every and any other power him hereunto enabling the Appointor hereby appoints the Trustee to be a trustee in the place of the said P Q and to act jointly with the Appointor for the purposes of the said statutory trust for sale or such of the same purposes as are still subsisting and capable of taking effect (*b*)

(2) In pursuance of the said agreements and in consideration of the sum of £—— to the Vendors now paid by the Purchaser (the receipt whereof the Vendors hereby acknowledge) the Vendors as Trustees and in execution of the said statutory trust for sale hereby convey to the

(*a*) This conveyance is drafted by Harold Potter, LL.D., of Gray's Inn, to accompany the note appearing at p. 232.

(*b*) The appointment includes an implied vesting declaration under the Trustee Act, 1925, s. 40.

Purchaser ALL the property more particularly described in the [First] Schedule hereto TO HOLD the same unto the Purchaser in fee simple

(3) *Add any additional clauses including if necessary statutory acknowledgment of deeds retained and certificate of value if price less than £500.*

IN WITNESS *etc.*

THE [FIRST] SCHEDULE ABOVE REFERRED TO.

Form 28.

Declaration of Trust of Land by a Husband in Favour of Himself and His Wife as Joint Tenants or Tenants in Common (*a*).

Parties.

THIS DECLARATION OF TRUST is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called the Husband) of the one part and B his wife (hereinafter called the Wife) of the other part.

WHEREAS :—

(1) [The Husband is seised in fee simple in possession free from incumbrances of the property hereinafter described]

Recitals: [seisin of husband]; [conveyance to husband and payment of one moiety by wife].

[By a conveyance dated *etc.* and made between X of the one part and the Husband of the other part the freehold property hereinafter described was in consideration of £Y therein expressed to have been paid by the Husband conveyed to the Husband in fee simple

(2) The said consideration of £Y was in fact provided as to one moiety thereof by the Wife out of her separate estate]

(3) It has been agreed that the Husband shall execute such declaration of trust of the said property as is hereinafter contained.

NOW THIS DEED made in consideration of the premises WITNESSETH as follows :—

Declaration of trust.

1. The Husband hereby declares that he will as from the date hereof stand possessed of ALL that *etc.* UPON TRUST at his discretion to sell the same or any part thereof with power to postpone such sale and will hold the net proceeds of sale (after payment of costs) and the net rents and profits (after payment of all outgoings) of such part thereof as shall remain for the time being unconverted IN TRUST for himself and the Wife as [joint tenants] [tenants in common in equal shares].

(*a*) This Precedent should not be used without due consideration as to the resulting death duties. It is usually preferable to devise the property to the wife by will, unless there is special reason for giving her a legal interest, or she has in fact paid half the purchase money. If she has paid half and the trust declared is for husband and wife as joint tenants, estate and succession duty will be payable on the death of the first to die on the value of his or her share. But, if the consideration has been wholly provided by the husband, duty will be charged on the value of the whole property if he dies within five years, or even subsequently, unless the wife's share of the rents and profits was actually received by her. If the trust is for the husband and wife as tenants in common, duty would be payable on the husband's death within five years as on an advancement or gift *inter vivos* of the wife's share. It is the practice of the Commissioners to require proof of actual payment by the wife of her share of purchase money (when this is alleged) out of her own property, and to avoid difficulty a record of withdrawal of the money from her banking account should be kept.

The above Declaration of Trust would appear to be liable to *ad valorem* stamp duty as a voluntary conveyance, unless the husband is already a trustee for the wife by reason of her payment, and the stamp should be adjudicated.

2. During the life of the survivor of the Husband and the Wife and the issue now living of His late Majesty King George V and for the term of twenty-one years after the death of such survivor the Husband or other the trustee or trustees for the time being of the said property shall (subject to the statutory provisions as to the number of trustees) by way of extension of the powers conferred on them by Statute have the same full and unrestricted power of dealing with the same property and any capital moneys arising under this present or any other power or in any other manner and of effecting any transaction whatsoever (whether such as is mentioned in section 64 of the Settled Land Act 1925 or not) in relation thereto respectively as if he or they were the absolute owners thereof and the statutory protection of purchasers shall apply to any person dealing with the Husband or the trustees (whether for value or not) (*b*). Additional powers.

3. It is hereby certified and declared that the transaction hereby effected does not form part of a larger transaction or a series of transactions in respect of which the value or the aggregate value of the property or interest conveyed or transferred exceeds £500 (*c*). Certificate as to value.

IN WITNESS *etc.*

Form 29.

Conveyance of Freeholds Reserving Sporting Rights for a Term of Years.

THIS CONVEYANCE is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called the Vendor) of the one part and B of *etc.* (hereinafter called the Purchaser) of the other part. Parties.

WHEREAS the Vendor is the estate owner in respect of the fee simple in the property hereby assured for his own use and benefit absolutely free from incumbrances and has agreed with the Purchaser for the sale thereof to him subject to the exceptions and reservations hereinafter contained at the price of £—— and the Vendor and the Purchaser have agreed to enter into the covenants on their part respectively hereinafter contained. Recital of agreement for sale.

NOW THIS DEED WITNESSETH as follows :—

1. In pursuance of the said agreement and in consideration of the sum of £—— on or before the execution of these presents paid by the Purchaser to the Vendor (the receipt and payment of which sum the Vendor hereby acknowledges) the Vendor as BENEFICIAL OWNER hereby grants and conveys unto the Purchaser ALL that *etc.* EXCEPT AND RESERVING unto the Vendor and his successors in title and all persons authorised by him or them for the term of —— years from the date hereof the exclusive right and liberty of hunting sporting shooting coursing [hawking] and fishing over and upon [the property hereby assured] [the piece of land coloured pink on the plan hereto annexed] and of carrying away and keeping for his own use and benefit all game Conveyance. Parcels. Reservation of sporting rights.

(*b*) It is unnecessary to disclose the trust to a purchaser during the husband's life as he has the deeds and can convey as beneficial owner. A purchaser would have no notice of any claim to duty on the wife's death. Disclosure would involve the necessity of appointing another trustee. A covenant of indemnity by the wife in regard to leaseholds is unnecessary, as the husband would be entitled to be indemnified by the wife personally and also out of the property.

(*c*) This will only be applicable where the wife has not paid any part of the purchase money.

(which shall for the purposes of this deed include [deer] foxes otters hares and rabbits and all other animals usually the subject of sport) and all birds of every kind whether or not in the nature of winged game and all fish respectively caught killed or taken under this present right or liberty and of [rearing and] preserving the nests and eggs of all winged game and cutting the weeds in any river stream or watercourse SUBJECT nevertheless as to hares and rabbits to the provisions of the Ground Game Acts and without prejudice to the right of the Purchaser shoot rooks and sparrows for the protection of his crops and to shoot trap hunt for and in any manner kill rats and other vermin TOGETHER also with the right for all or any of the purposes aforesaid to enter on and pass or repass over the [property hereby assured] [land coloured pink] the Vendor and his successors in title making good all damage to the land fences hedges trees plantations and crops arising from the exercise and enjoyment of the rights and liberties hereby granted To HOLD the same except and reserved as aforesaid unto the Purchaser in fee simple.

Habendum.

Covenant by Purchaser.

2. The Purchaser hereby covenants with the Vendor that he the Purchaser and his successors in title will not during the said term of —— years from the date hereof

(1) Lay out or make any new roads or erect any new buildings on the said [property hereby assured] [piece of land coloured pink on the said plan] without the consent in writing of the Vendor

(2) Cut down any timber or other trees coppice or underwood or furze or other cover otherwise than in the course of good husbandry or block-up divert foul or pollute any ponds rivers streams or watercourses or permit or suffer any act or thing or use the property hereby assured in any manner which may disturb drive away injure or reduce the number of game or fish but will protect and preserve the game and fish and warn off trespassers and poachers and allow his name to be used in any proceedings against trespassers on being indemnified against costs.

Covenant by Vendor.

3. The Vendor hereby covenants with the Purchaser that the Vendor and his successors in title will during the said term of —— years exercise the rights and liberties hereby reserved in a proper and sportsmanlike manner (*a*) and will at the expiration of the said term leave a breeding stock of game and fish equal to that which now exists.

[4. *Certificate as to value.*]

[5. *Acknowledgment and undertaking as to documents.*]

IN WITNESS *etc.*

Form 30.

Lease of Sporting Rights for a Term of Years over an Estate Part of Which is Let to Tenants.

Parties.

THIS LEASE made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called the Landlord which expression shall where the context so admits include the person or persons for the time being entitled to receive the rent hereby reserved) of the one part and B of *etc.* (hereinafter called the Tenant which expression shall where the

(*a*) If the fishing is valuable, covenants as to the method of fishing may be desirable.

context so admits include his executors administrators and assigns) of the other part

WITNESSETH as follows :— Testatum.

1. In consideration of the rent and the covenants on the part of the Tenant hereinafter reserved and contained the Landlord doth hereby demise unto the Tenant ALL THAT the exclusive right and liberty with all persons authorised by the Tenant of hunting sporting shooting coursing [hawking] and fishing over and upon the Landlord's estate known as —— situate in the parishes of —— and —— in the County of —— and described in the Schedule hereto and of carrying away and keeping for his own use and benefit all game (which expression shall for the purposes of this Lease include [deer] foxes otters hares and rabbits and all other animals usually the subject of sport) and all birds of every kind whether or not in the nature of winged game and all fish respectively caught killed or taken under this present right and liberty and of [rearing and] preserving the nests and eggs of all winged game SUBJECT nevertheless as to hares and rabbits to the provisions of the Ground Game Acts TOGETHER also with the right for all or any of the purposes aforesaid to enter on and pass and repass over the said —— Estate Demise of sporting rights.

To HOLD all the premises unto the Tenant for the term of —— years from the —— day of —— 19— determinable as hereinafter mentioned subject as to such parts of the said —— Estate as are let to the rights of the tenants thereof and as to the entirety thereof to the right of the Landlord to cut down timber and other trees and the right of the Landlord and the said tenants to cut coppice underwood furze and other cover in the course of good management but so that the last-mentioned rights shall not be exercised during the nesting season without the consent in writing of the Tenant Habendum.

YIELDING AND PAYING therefor the yearly rent of £—— by equal half-yearly payments in advance on the 2nd day of August and the 2nd day of February in every year the first payment to be made on the said —— day of —— 19—. Reddendum.

2. THE TENANT hereby covenants with the Landlord in manner following that is to say :— Tenant's covenants:

(1) To pay the said rent hereby reserved at the times and in manner hereinbefore mentioned to pay rent;

(2) To pay in addition to the said rent all rates and taxes for the time being payable in respect of the demised rights and liberties and also to repay to the Landlord all sums paid by him in respect of any such rates and taxes to pay rates;

(3) Not to assign underlet or part with the rights and liberties hereby demised or any of them without the consent in writing of the Landlord not to assign;

(4) To exercise the rights and liberties hereby demised in a proper and sportsmanlike manner to exercise rights in proper manner;

(5) Not to break tread down or damage the banks hedges fences gates plantations or crops upon the said —— Estate and to make good to the satisfaction of the Landlord or pay reasonable compensation to the Landlord and the tenants of the said —— Estate for any such breaking treading down or damage and to keep the Landlord not to damage hedges, etc.;

indemnified against all proceedings claims and demands by such tenants in respect thereof

to pay compensation for damage by game;

(6) To keep down the number of hares and rabbits on the said —— Estate and to pay compensation to the Landlord or the tenants of the said —— Estate as the case may be for any damage caused by hares or rabbits to the plantations or crops thereon and to keep the Landlord indemnified against all proceedings claims and demands by such tenants in respect thereof

or under Agricultural Holdings Act;

(7) To pay all compensation payable by the Landlord under section 11 of the Agricultural Holdings Act 1923 to tenants of the said —— Estate in respect of damage to their crops by game as therein defined

to keep down vermin;

(8) To keep down all vermin and other creatures (other than foxes) which may destroy game or the eggs of winged game and to permit the Landlord and the tenants of the said —— Estate to shoot rooks and sparrows for the preservation of his and their crops

not to overstock;

(9) Not to overstock the said —— Estate with game to the prejudice of the Landlord and the tenants of such Estate and his and their crops

to employ keepers;

(10) At all times during the term hereby granted to keep at least —— keepers and watchers and —— water-bailiffs to preserve the game and fish upon the said —— Estate and to warn off all persons attempting to trespass or poach thereon

to keep up head of game;

(11) To use his best endeavours to preserve a proper and sufficient head of game and to protect the nests and eggs thereof and to keep the lakes ponds rivers and streams sufficiently stocked with fish and to restock the same as and when necessary and protect and preserve the spawn and young and to keep the weeds in the said lakes ponds rivers and watercourses properly cut

to fish in river by rod and line.

(12) Not to fish or permit other persons to fish in the River —— except by [rod and line] [fly fishing] and not to use or permit to be used nets for the taking of fish therein (except coarse fish)

(13) At the expiration or earlier determination of the term hereby granted to leave on the said —— Estate a proper and sufficient head of game and to leave the lakes ponds rivers and streams as well stocked with fish as at the commencement of the said term.

Landlord's covenants:

3. THE LANDLORD hereby covenants with the Tenant in manner following that is to say:—

to proceed against trespassers;

(1) At all times during the term hereby granted if and when so requested in writing by the Tenant and upon being sufficiently indemnified by the Tenant against all costs and expenses either himself to take and bring all necessary actions and proceedings against poachers and trespassers or to permit his name to be used in any such actions and proceedings and to sign and serve notices to trespassers to keep off the said —— Estate

for quiet enjoyment.

(2) That the Tenant paying the rent hereby reserved and observing and performing the covenants on his part herein contained may peacefully and quietly enjoy the rights and liberties hereby demised without any interruption or disturbance from or by the Landlord or any person or persons claiming under through or in trust for him.

4. PROVIDED ALWAYS and it is hereby agreed as follows:—

(1) If the Tenant (meaning the Tenant personally) shall die during the term hereby granted and his personal representatives shall be desirous of determining this Lease and of such desire shall give one month's notice in writing to the Landlord (such notice to be served in accordance with the provisions of section 196 of the Law of Property Act 1925) and shall pay all rent hereby reserved and observe and perform all covenants on the part of the Tenant herein contained up to the date of such determination then and in such case this present Lease and everything herein contained shall at the expiration of such notice cease and be void but without prejudice to any right or remedy in respect of any antecedent breach of any covenant or condition herein contained

Power to determine on death of tenant.

(2) If the term hereby granted shall be determined by such notice as aforesaid at any time between the 2nd day of February and the 1st day of September in any year of the term the Landlord shall repay or allow to the personal representatives of the Tenant all expenses incurred by him or them as from the end of the preceding season up to the date of determination of and incidental to the protection preservation and rearing of game on the said —— Estate

Provision as to expenses incurred by tenant.

(3) If any half-yearly payment of the rent hereby reserved or any part thereof shall be in arrear and unpaid for twenty-one days after the same shall have become due (whether the same shall have been legally demanded or not) or if there shall have been any breach by the Tenant of any of the covenants conditions and agreements herein contained and on his part to be performed and observed or if the Tenant shall become bankrupt or make any arrangement or composition with his creditors then and in any such case the demise hereby made and the said term of —— years hereby granted shall forthwith absolutely cease and determine but without prejudice to any right or remedy of the Landlord in respect of any breach or non-observance by the Tenant.

Proviso for cesser.

5. ANY dispute or difference arising under this Lease shall be referred to the arbitration of a single arbitrator in accordance with the provisions of the Arbitration Acts 1889—1934 or any statutory modification or re-enactment thereof for the time being in force.

Arbitration clause.

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

Form 31.

Lease of Sporting Rights for the Season—Short Form Reserving Concurrent Rights of Fishing to Landlord.

THIS DEED made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called the Landlord) of the one part and B of *etc.* (hereinafter called the Tenant) of the other part

Parties.

WITNESSETH that the Landlord lets and the Tenant takes ALL THAT the right and liberty of hunting sporting shooting and fishing over and upon the Landlord's estate known as —— situate in the County of —— and described in the Schedule hereto and of carrying away for his own use all game winged game and other birds and fish caught

Demise

killed or taken AT the rent of £—— payable by three equal instalments the first to be paid on the execution hereof the second on the —— day of —— next and the third on the —— day of —— next For the term of the ensuing season commencing on the —— day of —— next and terminating on the —— day of —— next but determinable as hereinafter provided AND the Tenant hereby agrees to pay the said rent at the times and in manner aforesaid and to exercise the rights and liberties hereby demised in a proper and sportsmanlike manner paying compensation for all damage caused and to permit the Landlord and all persons authorised by him (not exceeding — at one time) to fish in the River —— concurrently with the Tenant (*a*) and also not to assign underlet or part with the said demised rights and liberties without the consent in writing of the Landlord AND the Landlord hereby agrees to provide — gamekeepers to preserve and protect the game and fish PROVIDED that if the Tenant shall die during the said ensuing season his personal representatives may give one week's notice in writing to the Landlord to determine this demise upon the expiration of which notice the term hereby granted shall forthwith cease but without prejudice to any accrued right of action.

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

(*a*) This, of course, does not give the landlord a legal *profit à prendre*. If this is desired, the tenant should be granted concurrent sporting rights with the landlord, or the tenant should make a re-grant to him, provided, of course, the right is not so limited as to be capable of subsisting only as a personal licence. See *Re Vickers' Lease, Pocock* v. *Vickers*, [1947] 1 All E. R. 707.

INDEX

TO THE CONVEYANCER, VOLUME 11.

ACCRUER,
clause of, **340, 346, 349, 353**

ACCUMULATION,
estate duty on, 343
income tax on, 81, 82
recovery of, 85
power to apply income for maintenance or accumulate, **348**
trust for, **338**

ACQUISITION OF LAND. See COMPULSORY PURCHASE.

ADEMPTION,
gift of shares, of, by reconstruction of company, 116
undivided share in land, of, 286

ADMINISTRATOR,
conveyance by executor of, 3, 80, 81
deceased beneficiary, of, assent to vesting in, **332**
grant of representation constitutes title of, 92
And see PERSONAL REPRESENTATIVES.

ADVANCEMENT,
power of, **339, 340, 344–346, 349, 353, 354**

ADVERTISEMENTS,
interim development control over, 24–27, 199
licence to exhibit, 173
notice by local authority to remove, 113
planning provisions as to, 20–27, 150, 199

AGENT,
commission of, 278
notice to quit given by, 60

AGREEMENT,
excess profits tax, post-war refunds, as to payment of, **369**
partnership, for, between two small traders, **355**
tenancy, for, excluding Agricultural Holdings Act, **324**

AGRICULTURAL HOLDING,
agreement for tenancy of, to exclude the Act, **324**
notice to quit, 214

AGRICULTURE,
Agriculture Bill, 1947...143–145

AIR,
civil aviation, acquisition of land for, 77–80

ALIEN,
change of name by, 10

AMENITIES,
advertisements and planning provisions, 20–27

ANIMALS,
dangerous, liability for, irrespective of escape, 266
highway, straying on, 212
trespass by, 262

[*Black figures indicate Precedents.*]

ANNUITY,
loan or, 124, 299
separation, death of husband, 64
tax-free, Finance Act, 1941, s. 25...126, 127
crossed by reference to Ceylon tax, 70
trustees' interest in reliefs and allowances, 128, 300

APPEAL,
county court, from, note of judgment, 133
planning authority, from, 150, 151

APPROPRIATION,
power of, **351**

ARBITRATION
clause, assignability of, 54
partnership deed, in, **356, 357, 362**
medical partnership, as to, 43, 53, **357, 362**

ARTICLES OF CLERKSHIP,
declaration as to due execution of, **9**

ASSENT,
administrator, by, to vesting in himself, as trustee for sale, 3
of deceased beneficiary, to vesting of freeholds in, **332**
charity, to vesting of freeholds in trustees of, **333**
declaration of no previous, **322, 328**
executor of administrator, by, 2
of presumed survivor of joint tenants, by, **327**
of trustee, by, 3
executor-beneficiary, by, 4
long term to protect against liability for death duties, **321**
operation of, 163
personal representatives of last surviving tenant in common, by, 4, 5
tenant for life, by, land being held in undivided shares, **329**
to resting in themselves of freeholds devised in undivided shares, **331**
registered land, to vesting in tenants in common of, **332**
tenants in common, to vesting in four out of five, subject to mortgage, **329**
to vesting of leaseholds in, additional powers conferred, **330**

ASSIGNMENT,
arbitration clause, of benefit of, 54
equitable, assurance policy, by delivery of, 278

BANK,
executor, will appointing, **371**
following money paid into, 276, 277

BANKRUPTCY,
mortgagor, of, leave to sell, 212
surplus assets, bankrupt's interest in, 213
tenancy expiring after, no statutory tenancy, 133

BARRISTER,
note of judgment in county court, must take, 133

BEQUEST,
shares, of, **334**
wife, to, of personal chattels, **334**

BUILDING,
covenant to erect, 178
preservation order, 150

BUILDING SOCIETY,
mortgage to, redemption of, 6
surety not liable for compound interest, 279

BURIAL,
husband's liability for funeral expenses, 122
right of, nature of, 171, 172

BUSINESS NAMES, REGISTRATION OF,
maiden name, business carried on in, 111

CHARITY,
assent to vesting of freeholds in trustees of, **333**
ceasing to exist in lifetime of testator, 113
character of legatee, 283
charitable or benevolent purpose, 275
cy-près doctrine, 285
parish, gift for work in, 57
purpose beneficial to the community, 283
receipt by trustees of, 88, 89
vicar, gift to, 57

CHILD,
condition calculated to separate from parent, 218
income tax, relief in respect of, 85
settlement on, to avoid, 81, **337, 348, 351, 353**
licensee, duty owed to, 215
settlement on, 81, **334, 337, 342, 348, 351, 353**
And see INFANT.

CIVIL AVIATION,
acquisition of land for, 77–80

COAL,
compensation, under Coal Act, 1938...97
under Coal Industry Nationalisation Act, 1946...106–109
limitation of actions against Board, 109
nationalisation of, 94–111
support, withdrawal of, 97, 109, 110

COMMONS,
cattle straying from, 212

COMMORIENTES,
joint tenants, assent by executor of presumed survivor of, **327**

COMPANY,
bonus shares, power to trustees to invest in, **377**
capital profits, whether capital or income, 116, 289
directors' fees, power to trustees to retain, **334**
investment company, member able to secure application of income for his benefit, 72
liquidator must concur in assignment subject to charge, 57
receiver may sell without leave, 56
reconstruction of, power to trustees to make arrangements upon, **377**
shares, settlement of, upon wife and children, **334**

COMPENSATION,
Civil Aviation Act, 1946, under, 79
Coal Act, 1938, under, 97, 98
Coal Industry Nationalisation Act, 1946, under, 106–109
medical practice, in respect of, 42, 44, 46, 47
planning, development value, on transfer to nation of, 155–157
existing use, on order for discontinuance of, 149
trees preservation order, 149
whether personalty or realty, 149

COMPULSORY PURCHASE,
civil aviation, for, 77–80
housing, for, declaration of vesting in corporation, **346**
Minister, duty of, 111, 214, 244–259, 283
new towns, for, 7, 254
sports ground, of, 56

[*Black figures indicate Precedents.*]

CONDITION,
precedent, void, effect of, 218
separation of parent and child, calculated to bring about, 218

CONDONATION,
clause in separation deed, 14
condoned offence, damages in respect of, 297
revival of maintenance order after, 221

CONNIVANCE,
separation agreement operating as, 12–14

CONTRACT,
medical partnership, for, frustration of, 43
promise not to enforce rights under, 128

CONVEYANCE,
general words imported in, 174, 175
joint tenants, by sole survivor of, 88, 231, **379**
sporting rights, reserving, **381**

CO-OWNERS,
conveyance by survivor of, 88, 231, **379**
And see JOINT TENANTS; TENANTS IN COMMON.

CORPORATION,
declaration that land acquired for housing is vested in, **346**
sole, vicar as, 58

COUNTY COURT,
note of judgment in, duty of counsel or solicitor to take, 133
reform, 229

COURTS (EMERGENCY POWERS) ACT, 1943,
coal owners entitled to protection of, 108
evacuated areas, 230
mortgage, parties to application for leave to realise, 212
receiver for debenture holders may sell without leave under, 56

COVENANT,
against competition with medical practice, 44, 216, **362**
Law of Property Act, 1925, s. 80 (1), effect of, 64
positive, whether assignee bound to allow performance of, 178, 179
quiet enjoyment, for, **326**
title, for, effect of planning legislation on, 148, 149
unregistered, enforceability of, under Civil Aviation Act, 1946...78
water, to supply, 54
See also RESTRICTIVE COVENANT.

CUSTOM,
acquisition of rights by, 177
exclusion of, **327**

DANGEROUS OPERATIONS,
independent contractor, performed by, 32, 38, 264
liability in respect of, 260, 263

DANGEROUS PREMISES,
landlord of, liability of, 27–29
licensee upon, duty owed to, 215

DEATH DUTIES,
assent to avoid liability for, **321**
declaration of trust by husband, 380
land accepted in payment of, 9
security for discharge of, 321
See also ESTATE DUTY; SUCCESSION DUTY.

DECLARATION
of trust by husband in favour of wife and himself, **380**
vesting in corporation land acquired for housing, **346**

DEED,
parol variation of, 128

DESERTION,
association with servant, 293
maintenance agreement does not preclude, 11
order based on, husband resident in Scotland, 294
revival of, 221
neurotic condition of husband, 220
refusal of sexual relations, 66, 295
rejection of offer to return, 65
same house, parties living in, 65, 121, 221, 295
separation agreement, effect of, 11, 16
supplemental petition, 64

DIPLOMATIC PRIVILEGE,
consent to underlet refused on ground of, 223

DIVORCE,
appeal, security for wife's costs, 296
whether bar to making decree absolute, 295
condoned adultery, damages in respect of, 297
cruelty due to refusal to obey orders, 120
desertion. *See* DESERTION.
insanity, 219, 220
judicial separation, after, costs of petitions, 222
maintenance. *See* MAINTENANCE.
marriage after disappearance of first husband, 67
nullity. *See* NULLITY.

DOMICIL,
marriage, does not determine character of, 202
parties must be capable of, by law of, 204, 205

EASEMENT,
classes of, 172
equitable, licence as, 170
unnecessary registration of, 86
gas mains, right to lay, not, 113
knowledge of, as affecting covenants for title, 149
licence amounting to grant of, 166
right of entry for purpose relating to dominant land, 171
smoke, right to discharge, 172

ELECTRICITY,
batteries wired to generator, whether fixtures, 224

EQUITABLE ASSIGNMENT,
assurance policy, delivery of, 278

EQUITABLE EASEMENT,
licence as, 170
unnecessary registration of, 86

ESCROW,
conveyance delivered as, notice to quit given after, 226

ESTATE AGENT,
commission of, 278

ESTATE DUTY,
cesser of interest in contingent residuary gift, 123
Irish settlement, proceeds re-invested in England, 304

ESTATE DUTY—*continued.*
settlement made within five years of death, 9, 343
on children, 339
reserving interest to settlor, 85, 86, 340
See also DEATH DUTIES.

ESTOPPEL,
promise to reduce rent, 128

EVIDENCE,
Minister, before, 111, 214, 244–259, 282, 283

EXCESS PROFITS TAX,
post-war refunds, agreement as to payment of, **369**

EXECUTOR,
administrator, of, conveyance by, 3, 80, 81
appointment of, **334**
controlled house, residing in, 61
literary, will appointing, **371**
married woman, of, payment of medical and funeral expenses by, 122
order of application of assets, 287
probate merely confirms title of, 92
receipt by, 89
will appointing bank as, **371**

FENCES,
whether duty to maintain, 212

FIRE,
independent contractor, caused by, 31
liability for escape of, 281

FISHING RIGHTS,
lease of, **382, 385**
reservation of, 216, 280, **325, 381, 385**

FIXTURES,
agricultural, 324, **327**
batteries wired to generator, 224

FLATS,
conversion of house into, permission for, 148, 154

FORESTRY
dedication covenant, 230

FUNERAL EXPENSES,
husband's liability for, 122

GAS,
geyser, landlord not responsible for, 215
mains, support for, 113, 213

GIFT,
incomplete, until Treasury sanction, 55
within five years of death, estate duty on, 9

GOODWILL,
medical practice, of, 42, 44, 46, 47, 50–53, **361**

GROWING CROPS,
contract for sale of, 166

GUARDIAN,
will appointing, **334**

HIGHWAY,
animals straying on, 212
consent to run risk of accidents on, 260, 261
dedication under Rights of Way Act, 1932...54
nuisance to, liability of landlord for, 36

HIRE-PURCHASE,
lien for repairs, 55

HOTCHPOT
clause, **352**
whether forgiveness of debt, 58

HOUSING,
declaration vesting in corporation, land acquired for, **346**
duty of Minister, 111, 214, 244–256

HOWE v. *DARTMOUTH*,
Chesterfield's Trusts, testator entitled to property subject to discretionary trust, 291
date of valuation of unauthorised investment, 118
interest, rate of, 118

HUSBAND AND WIFE,
army separation allowance, property purchased with, 123
declaration of trust by husband in favour of himself and wife, **380**
funeral expenses, husband's liability for, 122
medical expenses, husband's liability for, 122
necessaries, payment by third person for, 298
unreasonable sexual demands, 299
And see DIVORCE; SEPARATION DEED.

INCOME TAX,
annuity, Finance Act, 1941, s. 25...126, 127
grossed by reference to Ceylon tax, 70
loan or, 124, 299
trustee's interest in reliefs and allowances, 128, 300
investment company, 72
maintenance, on payments for, 70
married woman living separate from husband, 127
power to enjoy, 71
profits of trade, purchases of endowment policies, 125
Schedule A, purchase of leasehold, completion statement, 145
separation agreements, on payments under, 18, 19
settlement to avoid, 9, 72, 81, **337, 348, 351, 353**

INDEMNITY,
personal representatives, to, 321, **328, 329**
trustees, to, **377**

INDEPENDENT CONTRACTOR,
liability for acts of, 31–33, 37, 38, 262–265

INEVITABLE ACCIDENT,
whether a defence to *Rylands* v. *Fletcher*, 274
to trespass, 261, 262

INFANT,
custody of, application by third party for, 298
guardian of, appointment of, **334**
maintenance of, jurisdiction of justices, 297
plaintiff in Chancery proceedings, 5

INHERITANCE (FAMILY PROVISION) ACT, 1938,
income tax, Finance Act, 1941, s. 25...127

INJUNCTION,
licence, against revocation of, 167, 170, 175, 177, 182, 183
nuisance, from mound against wall, in respect of, 56

[*Black figures indicate Precedents.*]

INSANITY,
divorce on ground of, 219
And see LUNATIC.

INTERIM DEVELOPMENT,
control of, 22, 23, 191–196
advertisements, over, 24–27, 199
meaning of, 191
And see TOWN AND COUNTRY PLANNING.

INVESTMENT
clauses, **341, 350, 376**

JOINT TENANTS,
assent by executors of presumed survivor of, **327**
conveyance by sole survivor of, 88, 231, **379**

JUDICIAL SEPARATION,
divorce, followed by, costs of petitions, 222

LAND,
death duties, given in payment of, 9
power to trustees to invest in, **376, 378**

LAND CHARGE,
assent protecting from liability for death duties, 322
Civil Aviation Act, 1946, under, 78
development charge, 158
licence as, 170, 173
new town designation order, 6
planning restrictions, 152
registration, unnecessary, of, 86

LAND TRANSFER ACT, 1891,
life estate excluded from provisions of, 161

LANDLORD,
consent to underletting, 223
dangerous premises, of, 27–30, 215
nuisance, liability in, 30–41
rent, promise to accept reduced, 128

LANDS CLAUSES CONSOLIDATION ACT, 1845,
vesting declaration under, 346

LAW OF PROPERTY ACT, 1925,
s. 40, entry after agreement not complying with, 59
s. 54 (2), date from which three years runs, 76
s. 62, what passes under, 174, 175
s. 80 (1), effect of, 64
s. 113, provision in assent as to application of, **323**

LEASE,
Agricultural Holdings Act, agreement excluding, **324**
new towns, of land in, 7, 8
oral agreement for, entry after, 59
promise to reduce rent, 128
planning authority, user not authorised by, covenant against, 149
sporting rights, of, **382, 385**
three years, date from which time runs, 76
validation of war-time, date when notice can be served, 131

LEASEHOLD,
assent to vesting of, in tenants in common, where additional powers conferred, **330**
registration of, effect of, 187, 237

LEGACY,
wife, to, **334**

LEGITIMACY,
child conceived before marriage annulled for non-consummation, of, 291
polygamous marriage, of child of, 209, 210

LICENCE,
assignee taking with notice of, 180, 181
Civil Aviation Act, 1946, effect of, 78
coupled with a grant, 165, 166, 181, 182
development, for, 157, 158
equitable easement, as, 170
gas pipes, to lay, 113, 214
injunction against revocation of, 167, 170, 175, 177, 182, 183
irrevocability of, 166–169
nature and effect of, 165–184
registration of, 173–177
run with land, does not, 169, 178
specific performance of, 167, 169
theatre, to enter, use, etc., 167, 177, 180–184
timber, to enter and carry away, 165, 182
trespass on revocation of, 182, 183

LICENSED PREMISES,
power of attorney by manager of, **375**

LICENSEE,
duty owed to, 215

LIEN,
costs, for, where deposit paid to stakeholder, 279
hire-purchase goods, for repairs to, 55

LIMITATION OF ACTIONS,
Coal Board, against, 109, 110
by, 110, 111
new town development corporation, against, 8

LOAN,
annuity or, whether transaction, 124, 299

LOCAL AUTHORITY,
declaration that land compulsorily acquired for housing is vested in, **346**
new towns, transfer of undertakings in, to, 7

LUNATIC,
registered land of, charge upon, **367**
transfer of, **364**
chargee joining in, **365**
settled land, **368**
transfer to, 366
voluntary patent, 219

MAINTENANCE
agreement, clause providing for determination of, 17
connivance, is not necessarily, 13
desertion, does not preclude, 11
children, of, agreement for, 18
continuance of liability for, 16
income tax on payments for, 18, 19, 70, 82, 349
jurisdiction of justices, 294, 297
power to apply income for, **348, 349, 352, 353, 354**
variation of amount of, 17, 18
withdrawal from cohabitation because of unreasonable demands, effect of, 299

MARRIAGE,
common law, 203
conception of, in English law, 201–211
polygamous, 68, 201–211

[*Black figures indicate Precedents.*]

MARRIED WOMAN,
business carried on in maiden name by, 111
medical and funeral expenses of, 122
And see HUSBAND AND WIFE.

MEDICAL PRACTITIONER,
covenant against competition, 216, 280, **362**
partnership deed, **357**
National Health Service as affecting, 41–53
venereal disease, disclosure as to, 68

MERGER,
declaration against, **323**

MINERALS,
reservation of right to, **325**

MISTAKE,
money paid by, recovery of, 275–278

MONEY PAID,
mistake, by, 275–278
tracing, 276, 277

MORTGAGE,
assent to protect against liability for death duties, **321**
to vesting in four out of five tenants in common subject to, **329**
building society, to, redemption of, 6
compound interest, 279
leave to realise, respondents to application for, 212
planning restrictions, effect of, on, 153
power to trustees to invest in land, **376, 378**
puisne, cancellation of registration of, 86
receipt by trustee-mortgagee, 89
tenant at will, equitable right to redeem of, 212
vested in vendor through discharge after completion, surrender of, **374**

NAME,
change of, 10
married woman carrying on business in maiden name, 111

NATIONAL HEALTH SERVICE,
medical partnerships, as affecting, 41–53, 357

NATIONALISATION,
coal, of, 94–111

NATURAL JUSTICE,
duty of Minister, 111, 214, 244–259, 283

NEGLIGENCE,
animals straying on highway, 212
dangerous operations, in performing, 263
independent contractor, of, 38, 262–265
landlord, liability of, 27–30, 215
licensee, duty owed to, 215
nuisance independent of, 265
Rylands v. *Fletcher*, in, 261, 262, 274
trespass, in, 261

NEW TOWNS,
accommodation for persons displaced, 8
designation order, 6
development corporation, 7
limitation of actions against, 8
owner may compel acquisition by, 8
duty of Minister, 254–259, 283
effect of Act on conveyancing, 142, 143
land acquired for cannot be re-sold freehold, 7

NEXT FRIEND,
appointment of new, in Chancery Division, 5

NOTICE,
licence, of, purchase with, 180
partnership, power to determine by, **358**

NOTICE TO QUIT,
agent, given by, 60
Agricultural Holdings Act, land subject to contract of sale, 214
provision for, in tenancy agreement excluding, **324**
currency of existing notice, given during, 226
current period, expiring at end of, 60

NUISANCE,
gas mains, interference with support of, 113, 213
independent contractor, created by, 31
landlord, liability of, 30–41
mound against wall, 56
queue, 54
Rylands v. *Fletcher* part of law of, whether, 259, 265–267
statutory, 39
third party, created by, 37

NULLITY,
non-consummation, acquiescence in use of contraceptives, 292
child conceived before marriage, 291
impotence, knowledge before marriage of, 222
onus of proof after intervention by King's Proctor, 121
polygamous marriage, 68, 205, 206
venereal disease, 68

PARTNERSHIP,
medical, deed of, **357**
National Health Service as affecting, 41–53, 357
small traders, agreement for, between, **355**

PERPETUITY,
income tax on accumulations, 81, 353
period, clause as to, **331**
settlement on child born within, **354**
personal covenant not affected, 179

PERSONAL REPRESENTATIVES,
death duties, security for discharge of, by, 321
indemnity to, 321, **328, 329, 331**
medical practitioner, of, dispositions by, 50
settled land, dispositions of, by, 91–94, 159–165

PLANNING. *See* TOWN AND COUNTRY PLANNING.

POWER OF APPOINTMENT,
issue, in favour of, **340**
limitation on, **339**
persons entitled in default of exercise of, 217
release revoking prior revokable exercise of, 56
special, soldiers' will of personalty, exercised by, 59
surviving spouse, in favour of, **339**
trusts in default of exercise of, **340, 345**

POWER OF ATTORNEY,
licensed premises, by manager of, **375**

PROBATE,
grant of, effect of, 91, 92
revocation of, effect of, 92, 160–164
settled land, 91–94, 159–165

[*Black figures indicate Precedents.*]

PROFIT A PRENDRE,
contract to grant, enforcement of, 177
fishing rights, 216, 218
sporting rights, conveyance reserving, **381**
lease of, **382, 385**

PUBLIC INQUIRY,
duty of Minister, 214, 244–259, 283

QUARTER SESSIONS,
planning appeals to, 151

QUIET ENJOYMENT,
covenant for, **326**

RATES,
rent, not included in, 224

RECEIPT,
executor, by, 89
mortgagee, by, 89
trustee, by, 88–90

RECEIVER,
debenture holders, for, may sell without leave, 56
lunacy in, transfers of registered land by and to, **364–368**

RECITAL,
of agreement for sale, **381**
to practice in partnership, **357**
conveyance to husband and payment of moiety by wife, **380**
to joint tenants, **327**
death duties, of payment of, **328**
of *commorientes*, **328**
of intestate, **332**
desire to make a settlement, **348, 351, 353**
family of settlor, **337**
probate, **328**
relationship to settlor, **342**
seisin of husband, **380**
senior partner's practice, **357**
transfer of investments, **337, 342, 348, 351, 353, 354**
will of estate owner of freeholds, **332**
of leaseholds, **330**

REGISTERED LAND,
assent to vesting of, in tenants in common, **332**
Australasian cases concerning, 188–190, 238–244
Coal Commission, acquired by, 97
forged transfer of, 188
leaseholds, 187, 237
locality of sale of, 282
lunatic, charge upon, by, **367**
of, transfer of, **364**
chargee concurring in, **365**
settled land, **368**
transfer to receiver on behalf of, **366**
registered estate independent of common law estate, 232–244
nature of, 184–190, 232–244
sole trustee acquiring, 89, 90
title to, 185–190
Torrens system, 184, 233, 239

RELEASE,
hotchpot clause, whether, 58, 59
mortgage vested in vendor through discharge after completion of, **374**
power of appointment, of, revoking prior exercise, 56

[*Black figures indicate Precedents.*]

RENT,
promise to accept reduced, 128
rates not included in, 224

RENT RESTRICTION ACTS,
apportionment to determine standard rent, 133
attendance, substantial portion of rent attributable to, 61
bankruptcy, tenancy expiring after, no statutory tenancy, 133
executor resident in house, 61
furniture, payment for, 61
greater hardship, 131–133

REQUISITION,
Coal Industry Nationalisation Act, 1947, property subject to, 106
medical practitioner's house, on sale of, 49
new town, inquiry as to, 7

RESTRAINT OF TRADE,
medical practitioner's assistant, 216, 280, **362**

RESTRICTIVE COVENANT,
forestry dedication, 230
unnecessary registration of, 86
unregistered, enforceable under Civil Aviation Act, 1946...78

REVIEWS,
Bean, P. R. and Lockwood, A.: Rating Valuation Practice, 136
Blundell, L.: Rent Restrictions Guide, 73
Chanter, H. R.: London Building Law, 138
Cohn, E. J.: Legal Aid for the Poor, 306
Conveyancer's Year Book, 1946..305
Cross, R.. Wills, 306
Dymond, R.: Death Duties, 135, 305
Green, G. M.: Death Duties, 227
Hanbury, H. G.: Modern Equity, 228
Hanson: Death Duties, 139
Hilbery, Sir M.: Duty and Art in Advocacy, 305
Jackson and Gossett: Investigation of Title, 139
Kerr: Receivers, 139
Konstam, E. M.: Income Tax, 137
Law Quarterly Review, 74, 306, 307
Megarry, R. E.: Manual of Real Property, 227
Rent Acts, 73
Meinhardt, P.: Inventions, Patents and Monopoly, 228
Modern Law Review, 137, 306
Odgers, Sir C. E.: Construction of Deeds and Statutes, 138
Polak, A. L.: More Legal Fictions, 307
Pollock: Contracts, 75
Simplex Client's Instruction Forms, 304
Smith, A. E. and Turner, C. E.: Lawyer's Companion and Diary, 1947...308
Stevens, R. H.: Where to look for your Law, 307
Wolff, E.: Problem of Pre-War Contracts in Peace Treaties, 136
Wurzburg: Building Societies, 75

RIGHT OF WAY,
public, dedication of, 54

RYLANDS v. *FLETCHER*,
escape, necessity for, 271
inevitable accident, 274
land, whether plaintiff must have an interest in, 267, 272–274, 281
natural user, 32, 267–271, 281
negligence and, 261, 262
nuisance and, 32, 38, 259, 265–267
personal injuries, whether applicable to, 263, 266, 267, 273, 274
rule in, stated, 260, 271, 272
things naturally on the land, 268
trespass and, 259

[*Black figures indicate Precedents.*]

SALE,
medical practice, of, 42, 44, 46–49
receiver, by, does not require leave, 56

SEPARATION DEED,
annuity ending at husband's death, 64
common faults in drafting, 10–19

SETTLED LAND,
betterment rights in respect of, 157
building preservation order, expenditure under, 150
management of, between death and assent, 321
personal representatives, dispositions by, 91–94, 159–165
receipt for proceeds of sale of, 90
registered, of lunatic, transfer of, **368**

SETTLEMENT,
capital or income, capital profits, 116, 289
Howe v. *Dartmouth*, 118, 291
income tax, 9, 72, 81–86, 301
to avoid, 81–86, **337, 348, 351, 353**
investment clause, **341, 350, 376**
shares in company, of, on wife and children **334**

SHARES,
ademption of gift of, on reconstruction of company, 116
settlement of, on wife and children, **334**

SMALL TENEMENTS RECOVERY ACT, 1838,
rent does not include rates, 224

SOLICITOR,
articles of clerkship, declaration as to due execution of, 9
charging clause, **336, 341**
note of judgment in county court, must take, 133

SPECIFIC PERFORMANCE,
licence, of, 167, 169, 170
profit, of contract to grant, 177

SPORTING RIGHTS,
conveyance reserving, **381**
fishing rights, 216, 280
lease of, **382, 385**
tenancy agreement reserving, **325**

STAMP DUTY,
on assent to protect against liability to death duties, 321
declaration of trust by husband in favour of wife and himself, 380
vesting in corporation land acquired for housing, 346
separation agreement, 19
surrender of life interest, 373
of mortgage vested in vendor through discharge after completion, 374
voluntary settlement, 337, 340

STOCK,
coal industry nationalisation, 107, 108
development value compensation, 155–157

STRICT LIABILITY, 259–274. See *Rylands* v. *Fletcher*.

SUCCESSION DUTY,
locality of shares, 303
And see DEATH DUTIES.

SUPPORT,
coal mining provisions as to, 97, 109, 110
gas pipes, for, 113, 213

SURETY,
building society mortgage, 279

SURRENDER,
life interest, of, property remaining settled land, **373**
mortgage vested in vendor through discharge after completion, of, **374**

SURTAX. *See* INCOME TAX.

TENANT AT WILL,
equitable right to redeem of, 212

TENANT FOR LIFE,
death intestate of, 162
surrender by, property remaining settled land, **373**
And see SETTLEMENT.

TENANTS IN COMMON,
assent to vesting in four out of five, subject to mortgage, **329**
of leaseholds in, where additional powers conferred, **330**
of registered land in, **332**
death of survivor of, 4, 5
persons entitled in default of appointment, 217
sale by survivor of, 88
And see UNDIVIDED SHARES.

THEATRE,
licence to enter, use, etc., 167, 177, 180–184

TIMBER,
licence to enter and carry away, 165
reservation of right to, **325**
trees preservation order, 149, 150, 152

TOWN AND COUNTRY PLANNING,
advertisements, 113, 150, 199
appeals, 150, 151
betterment rights, 155–157
building preservation order, 150
Central Land Board, 155
change of user, permission for, 147–150
compensation, 149, 155–157
consent, future, validity of clause requiring, 112
contraventions, 190–200
control, effect of, 153–155
method of, 150–152, 193–196
covenants for title, effect on, 148, 149
development charge, 157, 158
development not subject to, 151
permission for, 147–150
value vested in nation, 155
enforcement notice, 151
flats, conversion of house into, 148, 154
historical review of, 191, 192
interim development. *See* INTERIM DEVELOPMENT.
land subject to a contract for sale, 154
Minister, duty of, 254, 282, 283
new towns. *See* NEW TOWNS.
offences, 151, 152
purchase notice where beneficial use impossible, 151

TOWN AND COUNTRY PLANNING—*continued.*
sports ground, 56
Town and Country Planning Bill, 1947...143, 147–159, 196–200
trees preservation order, 149, 150, 152
waste land, injury to amenities from, 150

TRACING,
common law, at, 276
equitable doctrine of, 276, 277

TRAMWAY,
covenant to provide crossings for, 179

TRESPASS,
agreement to allow landlord to take proceedings for, **325, 326**
cattle, by, 212, 262
inevitable accident, whether a defence to, 261
liberum tenementum, plea of, 60
licence, on revocation of, 182
Rylands v. *Fletcher*, part of law of, whether, 259

TRUST,
charity, for, declaration of, **333**
continuing, overpayments made under, 276
declaration of, by husband in favour of himself and wife, **380**
investment clauses, **341, 350, 376**

TRUST FOR SALE,
assent upon, for intestate's estate, **333**
for tenants in common, **329**
death duties, to pay, **322**
investments, trust to sell or retain, **348**
residuary gift, **335**

TRUSTEE,
appointment of additional, by sole surviving co-owner, 231
of beneficiary as new, by personal representatives, 3
of new, on death of surviving tenant in common, 4, 5
power of, **336, 341**
indemnity to, **377**
power to appropriate, **350**
to charge, **336, 341**
to determine questions, **350, 351**
to retain directors' fees, **334**

UNDIVIDED SHARES,
ademption of gift of, 286
assent to vesting in personal representatives of freeholds devised in, **331**
of tenant for life, land being held in, **328**
And see TENANTS IN COMMON.

VALIDATION OF WAR-TIME LEASES ACT, 1944,
date when notice can be served, 131

VENDOR AND PURCHASER,
completion, date of, 53
statement, deduction of tax, 145
dangerous premises, vendor not liable for, 27, 28
deposit paid to stakeholder, no lien for costs, 279
surrender of mortgage vested in vendor through discharge after completion, **374**

WATER,
covenant to supply, 54

WILL,
bank as executor, appointing, **371**
construction, dependants, 219
for life use, to revert if A does not remarry, 117
gift on death or marriage to issue living at death, 286
gift over excluding issue of proposed marriage, 117
gift to children of persons who shall have died in lifetime of A, 289
whether illegitimate child takes, 290
senior male of next senior branch, 286
family provision, 127
hotchpot clause, whether forgiveness of debt, 58
investment clauses, **341, 350, 376**
lapsed gift to charity, 113
literary executors, appointing, **371**
order of application of assets, 287
settling shares in company on wife and children, **334**
signature, position of, 58
soldier, of, exercise of special power over personalty by, 59
lost, evidence of contents of, 114
speaks from death, 117
undivided shares, ademption of, 286
devise in, assent to, **331**
void condition precedent, effect of, 218

[*Black figures indicate Precedents.*]

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ARTICLES, ETC.

CONVEYANCER'S NOTEBOOK 1
COMMON FAULTS OF OMISSION AND COMMISSION IN DRAFTING SEPARATION DEEDS AND AGREEMENTS. By D. TOLSTOY, Barrister-at-Law 10
ADVERTISEMENTS AND AMENITY. By DESMOND HEAP, LL.M., L.M.T.P.I. 20
CAVEAT LESSOR? By E. O. WALFORD, LL.D. 27
THE NATIONAL HEALTH SERVICE BILL AS AFFECTING MEDICAL PARTNERSHIPS. By OSWALD A. HEMPSON and N. LEIGH TAYLOR, Solicitors 41
NOTES OF RECENT CASES (*For List see over page*) 53
THE LIBRARY 73
CORRESPONDENCE 76

PRECEDENTS.

Assent by Personal Representatives of Deceased Owner or Tenant for Life of Freehold Lands to Vesting of Lands in Themselves for Long Term of Years to Protect them Against Liability for Death Duties 321
Agreement for Periodic Tenancy of Agricultural Land for Periods of 364 days each 324
Assent by Personal Representatives of Presumed Survivor of Commorientes who were Entitled as Joint Tenants 327
Assent by Personal Representatives of Tenant for Life in Themselves as Trustees of Settlement, Land being held in undivided Shares ... 328
Assent to Vesting of Land Subject to Mortgage in Four out of Five or more Tenants in Common 329
Assent to Vesting of Leaseholds in Tenants in Common where Additional Powers are Conferred 330

[Continued overleaf

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PRECEDENTS—*continued.*

Assent by Personal Representatives to Vesting in Themselves of Freeholds Devised in Undivided Shares 331

Assent to Vesting of Registered Land in Tenants in Common 332

Assent to Vesting of Freeholds in Administrator of Deceased Beneficiary 332

Assent to Vesting of Freeholds in Trustees of Charity 333

Will of Testator whose Estate principally consists of Shares in Private Company, Settling Shares on his Wife and Children, with Provisions for Wife and Children becoming Directors of Company 334

Clause for Incorporation in Deed of Variation of Partnership between Medical Practitioners in light of National Health Service Bill 53

LIST OF CASES NOTED.

Att.-Gen. *v.* Dyer, 54

Baindail *v.* Baindail, 68
Bowmaker *v.* Wycombe Motors, 55

C. *v.* C., 68
Chatterton's Settlement, *Re*, 56
Chichester's (Earl) Will Trusts, *Re*, 59
C. I. R. *v.* Compton, 72
Congreve *v.* C. I. R., 71

Delaney *v.* Smith, 59
Dwyer *v.* Mansfield, 54

Fry, *Re*, 55

Havelock *v.* Cobham-Grant, 70
Horn, *Re*, 58
Hornby, *Re*, 58
Hulme Estate Co. *v.* C. I. R., 73

Killner *v.* France, 53

Langstone *v.* Hayes, 64
Lawrence *v.* Hartwell, 61
Lemon *v.* Lardeur, 60

Maberley *v.* Peabody, 56

Northern Garage, *Re*, 56

Palser *v.* Grinling, 61
Property Holding Co. *v.* Mischeff, 63

R. *v.* Minister of Health, 56

Shayler *v.* Woolf, 54
Simpson's Estate, *Re*, 57
Spawforth *v.* Spawforth, 64
Spencer *v.* Robson, 70
Srini Vasan *v.* Srini Vasan, 68

Thomas *v.* Thomas, 65
Tweney *v.* Tweney, 67

Weatherley *v.* Weatherley, 66

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